Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

MELANIE HUGHES,

Petitioner,

v.

CLAYEO C. ARNOLD AND CLAYEO C. ARNOLD, PROFESSIONAL LAW CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1998, this Court decided *Kawaauhau v. Geiger*, affirming *In re Geiger*, which clarified the conduct required pursuant to the "willful and malicious injury" exception to discharge contained in 11 U.S.C. §523(a)(6). This Court announced that §523(a)(6) is "confined to debts 'based on what the law has for generations called an intentional tort.'" *Kawaauhau v. Geiger, (In re Geiger)*, 523 U.S. 57 at 60, citing *In re Geiger,* 113 F. 3d 848. "We believe as we have said, that the debtor's conduct cannot otherwise be said to be 'willful.'" *Geiger* at 853.

Here, the Ninth Circuit Court of Appeals has entered a decision in conflict with other United States Courts of Appeal on this important issue by upholding summary judgment of nondischargeability in favor of a prevailing party creditor for a judgment of attorneys' fees and costs they obtained in a Fair Employment and Housing Administration (FEHA) civil rights state court suit. No intentional tort, nor tortious conduct, was pled, nor litigated in the FEHA action. As hereafter set forth, the district court, in its published decision held: "Nondischargeable debt under §523 (a)(6) is not limited to debt arising out of an intentional tort." The Ninth Circuit affirmed, holding as "unavailing," Petitioner's argument that nondischargeability requires that the debt must be based on an intentional tort.

In addition to the intercircuit conflict, the Ninth Circuit opinion directly contradicts this Court's holding in *Kawaauhau*, and sanctions a departure from this previously established federal law so as to call for an

exercise of this Court's supervisory power. Thus, three questions are presented:

1. Whether the standard for nondischargeability under § 523(a)(6) no longer requires a creditor to demonstrate conduct based on an intentional tort?

2. Does the mere filing and pursuit of a failed civil rights lawsuit, in and of itself, which results in an attorney fee award to a prevailing defendant, satisfy the "willful and malicious injury" exception to discharge?

3. Can a debt be considered "willful and malicious" if no allegations of willful and malicious conduct have been pled, or litigated, in the underlying suit?

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OPINIONS BELOW

This action was initiated by Respondents in the United States Bankruptcy Court for the Eastern District of California after Petitioner filed for a Chapter 7 discharge of her debts. On June 14, 2005, Respondents filed an Adversary Complaint seeking to except from discharge, pursuant to 11 U.S.C. §523(a)(6), an attorney fee award obtained in state court against Petitioner. On August 24, 2007,the bankruptcy court issued its Memorandum Decision granting Respondent's moti on for summary judgment which is reprinted in **Appendix, (hereafter App.) 19-39.** The decision was not published. The Order was entered on August 24, 2007, **(App. 148-150)** and the Judgment was entered on March 3, 2008. **App. 151-152.**

Petitioner appealed to the United States District Court for the Eastern of District of California which affirmed the decision of the bankruptcy court and issued its order on August 11, 2008. The order is reprinted at **App. 5-18.** The citation for the opinion is *Hughes v. Arnold*, 393 B.R. 712 (E.D. California). Judgment was entered August 12, 2008. **App. 153.**

Petitioner filed a motion for rehearing on August 20, 2008. **App. 154-174**. Respondents opposed the motion **(App. 175-183)** and Petitioner filed a reply **App. 184-186.** On October 8, 2008, the Court denied the motion for rehearing. **App. 187**.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court, in its five paragraph decision, upheld the decision of the district court to affirm the bankruptcy

court's summary judgment in favor of Respondents. The court's Memorandum is reprinted at **App. 1-4.** The opinion was not published. Petitioner filed a Petition for Panel Rehearing and Rehearing *En Banc*. **App.205-225**. The panel denied the petition. **App.226.**

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BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States Bankruptcy Court for the Eastern District of California. The court entered judgment in favor of Respondents. Petitioner timely appealed to the United States District Court for the Eastern of District of California. The court entered its judgment affirming the bankruptcy court's decision on August 12, 2008. Petitioner timely appealed to the United States Court of Appeals for the Ninth Circuit. The court upheld the judgment of the district court affirming the decision of the bankruptcy court. Petitioner's petition for panel rehearing and rehearing *en banc* was denied on December 14, 2009. This petition is timely filed under Supreme Court Rule 13(3), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(I) Date the judgment or order sought to be reviewed was entered:

September 14, 2009.

(ii) Date of any order respecting rehearing:

December 14, 2009 (denial of petition for panel hearing and rehearing *en banc*).

(iii) Rule 12.5 considerations:

Not applicable to this Petition.

(iv) Statutory provisions conferring jurisdiction:

28 U.S.C. § 1254(1).

(v) Rule 29.4 statement:

Not applicable to this Petition.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES, AND REGULATIONS INVOLVED

11 U.S.C. § 523(a)(6):

(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

STATEMENT OF THE CASE

A. The Underlying Action in State Court.

In 1997, Respondents, Clayeo C. Arnold individually and Clayeo C. Arnold, a Professional Law Corporation (PLC) filed a lawsuit in state court against the Petitioner alleging nine (9) causes of action for Breach of Implied Contract, Breach of the Covenant of Good Faith and Fair Dealing, Misappropriation of Trade Secrets, U nfair Competi tion, Trespass to Ch attels, Claim and Delivery, Mandatory and Prohibitive Injunction, Declaratory Relief and Intentional Infliction of Emotional Distress.[2] "State Court First Amended Complaint for Damages and Injunctive Relief." **App. 40-55.** In the "Facts Common to All Causes of Action" section, at allegation 19, Respondents allege that Petitioner made "false allegations of sex discrimination." In the First Cause of Action (Breach of Contract), at allegation 31, they allege that Petitioner leveled "an allegation of sex discrimination" against Respondents "that was false." In the Second Cause of Action (Breach of Covenant of Good Faith and Fair Dealing) at allegation 38, they allege that Petitioner leveled "a false allegation of sex discrimination" against Respondents. In the Fifth Cause of Action (Trespass to Chattels) at allegation 54 they allege that Petitioner "intentionally interfered with the Law Firm's right to sole possession of the files." In the

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[2] At the time the suit was filed, Petitioner was known as Melanie S. Rieger.

Seventh Cause of Action (Mandatory and Prohibitive Injunction) at allegation 65 they allege that Petitioner's actions "are willful, wanton, and malicious and were done with the intent to deprive the Law Firm of its property." In the Ninth Cause of Action (Intentional Infliction of Emotional District) at paragraphs 71 and 72 they allege that Petitioner made the "false allegation of sex discrimination against" Respondents.

Later that year, Petitioner filed a Fair Employment and Housing (FEHA) sexual harassment lawsuit in state court against Respondents."State Court Complaint for Damages." **App. 56-79.**

Before trial on July 2, 1999 and again on July 8, 1999, the state court issued pre-trial orders adjudicating nearly all of Respondents' claims against Petitioner in Petitioner's favor. All causes of action for which Respondents sought punitive damages based upon Petitioner's alleged malicious conduct (except for the Fifth Cause of action for Trespass to Chattels) were dismissed with prejudice.

The remaining Trespass to Chattels cause of action and Petitioner's action for sexual harassment (the FEHA claim) were consolidated and the matters proceeded to a jury trial. In its verdict, the jury awarded Petitioner compensatory damages of $15,000.00 against the PLC, and awarded the PLC, compensatory damages of $237.50 on its cause of action for Trespass to Chattels. Despite awarding those damages to the PLC, the jury made a finding that Petitioner **did not** act with **malice**, nor **oppression.** "Verdict" at **App. 80-91, #'s 23 and 24.** In other words, Petitioner prevailed on every single cause of action wherein Respondents alleged she made "false allegations,"

"intentionally interfered with" and acted with"willful, wanton and malicious" intent. The trial judge then rendered a JNOV and entered judgment against Petitioner and in favor of Respondents as the prevailing parties in the FEHA action. **App. 92 and 94.**

The parties filed motions for attorney's fees. Respondents sought an award of attorneys fees as the prevailing parties under California Government Code §12965. In their application for fees, Respondents characterized Petitioner's FEHA action as "frivolous" which is the criteria authorized by that statute.[3]

Respondents' reply brief is based exclusively on the legal theory that Petitioner's action was "frivolous".["Reply Memorandum of Points and Authorities in Support of Defendants' Joint Motion for Attorneys' Fees and Costs."] **App. 124, Section B at 128.** In summation, Respondents asserted "the Court must conclude that [Petitioner's] action was frivolous, and award [Respondents]' their reasonable attorneys fees." Respondents also re-asserted that they were entitled to an attorney fee award under Government Code §12965. **App. 133.**

Issues of whether Petitioner acted "willfully" and with "malice" were never litigated in the post-trial moving papers, opposition papers, nor reply papers relating to the attorney fee motions. However, in the "Discussion" section of his order disposing of the

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[3] See *Mangano v. Verity, Inc.*, 167 Cal.App.4th 944, 949, 84 Cal.Rptr.3d 526, 529, explaining that prevailing defendants may recover attorney's fees under Cal.Gov.Code §12965 "only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious."

pleadings relating to attorneys fees, and after analyzing the "frivolous" requirement of Government Code §12965, the trial judge went on to add his unsolicited personal opinion on matters that had not been litigated, to wit, in part,

> "Her claim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold." **App. 134-137.**

This *dicta*, which was later described by the Bankruptcy Court as the trial judge "throwing in his two cents. . . ." as "gratuitous" and as made "in passing" have caused nothing but further litigation and mischief for the parties since written. [4] [5]

Thereafter, the PLC was awarded $19,626.05 in costs and $89,302.75 in attorneys fees and Arnold, individually, was awarded $265.00 in costs and

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[4] The Transcript of Proceedings of June 20, 2007 were not included in this appendix. They are located in the **Excerpt of Record (EOR) below at 202:5 to 204:22.**

[5] Since the unsolicited comments would later be repeated often by *both* Respondents and quoted in the adversary complaint [and even misquoted in the second cause of action when claiming that the *dicta* referred also to the PLC, it is important to note that the trial court's *dicta* concerned the Petitioner's alleged malice to Respondent Arnold (an individual) alone. The judge's unsolicited comments did not mention or pertain to the PLC at all. **EOR at 456:10.**

$66,213.50 in attorneys fees pursuant to Government Code §12965. ["Judgment on Order Disposing of Motions Related to Costs and Attorneys Fees."] **App. 138.**

B. The Underlying Action in Federal Court and the basis for Federal Jurisdiction.

The action commenced in Federal Court with the filing of Petitioner's Chapter 7 bankruptcy petition. The Respondents filed an adversary complaint seeking to except from discharge the judgment they obtained in state court pursuant to 11 U.S.C. §523(a)(6). **App. 144.** The complaint alleged that:

1) Petitioner acted willfully and intentionally in filing and pursuing her FEHA cause of action against them, and
2) The state court judge made a finding that Petitioner filed and pursued her FEHA cause of action with a malicious desire to harm them.

Respondents thereafter brought a motion for summary judgment of nondischargeability pursuant to §523(a)(6). In its analysis, the court determined that:

> "In order to find for the Plaintiff's [Respondents here] on this summary judgment motion, the court must be satisfied that both these tests [willful and malicious] are met by the state court's findings quoted above, and that this court should rely on those findings as preclusive in this proceeding." **App. 25**

The "findings" quoted were those from the state court judge that "[h]er claim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold."

In granting summary judgment in favor of Respondents on their §523(a)(6) claim, the bankruptcy court did give preclusive effect to the state court's "findings" in the attorney fee order that Petitioner acted "willfully" and "maliciously" in filing and pursuing her FEHA cause of action by ruling that the issues in state court were:

> (1) identical to the issue before him, (2) actually litigated in state court, (3) necessarily decided in state court, (4) in a decision that was final and on the merits, (5) between the same parties and that (6) the applicability of the doctrine of issue preclusion was fair and consistent with sound public policy. **App. 37**.

Petitioner appealed the decision to the United States District Court for the Eastern District of California. The court had jurisdiction pursuant 28 U.S.C. § 158(a). The issues as framed by the district court were 1) "whether an attorney's fees fee award is nondischargeable debt pursuant to §523(a)(6)" and 2) "whether the bankruptcy court properly relied on the state court's findings." **App. 12.**

To Petitioner's contention that nondischargeable debt is confined to debt based upon an intentional tort, the answer was:

"The Court disagrees. Nondischargeable debt under §523(a)(6) is not limited to debt arising out of an intentional tort; rather, §523(a)(6) excepts from discharge any debt for 'willful and malicious injury by the debtor,'" citing *In re Jercich*, 238 F.3d 1202. **App. 12**

To Petitioner's contention that the first, second and third prongs of the issue preclusion test the bankruptcy court applied were not met (specifically that the issue of "whether her conduct in initiating and prosecuting her sexual harassment claim resulted in willful and malicious injury was never actually litigated nor necessarily decided by the state court") the answer was:

> "The Court disagrees. The propriety of Appellant's [Petitioner here] conduct in pursuing her sexual harassment claim was squarely before the state court on Appellees' [Respondents here] motion for attorney's fees under §12965(b), which required the court to determine whether Appellant's conduct was unreasonable, frivolous, meritless, vexations or in bad faith." **App. 16.**

The court affirmed the summary judgment of the bankruptcy court. The citation for the published opinion is *Hughes v. Arnold*, 393 B.R. 712 (E.D. California). Petitioner appealed the decision to the United States Court of Appeals for the Ninth Circuit. The court had jurisdiction to take the case pursuant to 28 U.S.C. § 158(d).

In its five paragraph decision, the court ruled as "unavailing" Petitioner's contention that non-dischargeability under §523(a)(6) is conditioned on an intentional tort. The court instructed that the correct standard is "rather a general intention to cause injury" citing *Ditto v. McCurdy*, 510 F3d. 1070 (9th Cir. 2007). **App.3.**

The court also determined that the bankruptcy court properly gave preclusive effect to the state court order awarding attorney's fees because the issue of Petitioner's "willfulness and maliciousness was squarely before the court when it determined whether her conduct was unreasonable, frivolous, meritless or in bad faith under California Government Code §12965." **App. 3.**

The published opinion of the district upholding the summary judgment of the bankruptcy court in favor of Respondents was affirmed.

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ARGUMENT FOR GRANTING THE WRIT

1. This Court Should Grant the Petition to Resolve a Conflict Between the Decision of the Ninth Circuit Court of Appeals and the Decision of this Court in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) over Whether the Standard for Nondischargeability under 11 U.S.C. § 523(a)(6) No Longer Requires a Creditor to Demonstrate Conduct Based on an Intentional Tort.

A. The decision of the Ninth Circuit Court of Appeals stands in direct conflict with this Court's decision in *Kawaauhau*.

This case involves the issue of whether the mere filing and pursuit of a failed civil rights lawsuit, in and of itself, which results in an attorney fee award to a prevailing defendant, satisfies the "willful and malicious injury" exception to discharge found at 11 U.S.C § 532(a)(6) such that the resulting attorney fee judgment is nondischargeable.

In upholding the decision of the district court to affirm the summary judgment of nondischargeability of the bankruptcy court in this case, the Ninth Circuit failed to acknowledge the binding precedent set forth by this Court in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), and as a result, the Ninth Circuit's decision directly conflicts with the previous holding of this Court.

In *Kawaauhau,* this Court affirmed the holding of the Eighth Circuit, in *In re Geiger,* 113 F.3d 848 (1997) which clarified the conduct required pursuant to the "willful and malicious injury" exception to discharge contained in 11 U.S.C. §523(a)(6). In affirming *Geiger,* this Court announced that §523(a)(6) is "confined to debts 'based on what the law has for generations called an intentional tort.' " *Kawaauhau* at 60, citing *In re Geiger*. "We believe as we have said, that the debtor's conduct cannot otherwise be said to be 'willful.'" *Geiger* at. 853.

Here, the district court, in its published decision affirming the bankruptcy court's summary judgment order held that "Nondischargeable debt under §523 (a)(6) is not limited to debt arising out of an intentional tort" citing *Petralia v. Jercich (In re Jercich)* 238 F.3d 1202, 1209 (9th Cir. 2001). [6] **App. 12.**

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[6] The district court in relying on *In re Jercich* to support its ruling that an intentional tort is not required, completely skipped the first part of the *Jercich* court's analysis of an intentional tort requirement and jumped to the "maliciousness" section at page 1209 of the opinion. Far from doing away with the requirement that a debt be based upon an intentional tort, the *Jercich* court, which considered a debt stemming from a breach of contract, held that "to be excepted from discharge under §523(a)(6), a breach of contract must be accompanied by some form of "tortious conduct" that gives rise to 'willful and malicious injury'" and looked to state law to determine whether Jercich's conduct was tortious. "Under California law, 'conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law.'" *Id.* at 1206. The court determined that based on the state court's findings, it was clear that Jercich violated his duty under California Labor Code § 216 which makes it a misdemeanor for an

The Ninth Circuit held as "unavailing" Petitioner's argument that nondischargeability requires that the debt must be based on an intentional tort. These lower court rulings simply do not square with the mandate announced by this Court. Furthermore, the Ninth Circuit's newly-announced and more relaxed standard that a mere "general intention to cause injury" is now the threshold inquiry into nondischargeability, threatens to erase twelve years of settled Federal Law. **App. 4**.

In re-defining the term "willful" from this Court's standard of being synonymous with an "intentional tort" to the diluted standard of a "general intent to cause injury", the Ninth Circuit has rendered nondischargeable all debts owed to any injured creditor where the debtor happened to also have malice. If the standard approved by the Ninth Circuit is correct, whether any wrongful injury is dischargeable is dependent on the presence or absence of debtor's malice alone.

A negligent tortfeasor has a "general intention to cause injury" by his failure to act diligently when a duty is owed. Reckless disregard for the safety of others similarly fulfills the "general intention to cause injury". Under the "general intention to cause injury" standard penned by the Ninth Circuit, damages resulting from failing to keep a reasonable lookout

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employer, whom has the ability to pay wages when they are due, and willfully chooses not to. *Id.* at 1207. It was only after the court first identified the existence of the intentional tort, that it went on to analyze whether Jercich acted "willfully" and "intentionally."

while driving and hitting a stranger with one's vehicle is dischargeable, but if that person turns out to be a hated enemy, the debt is non-dischargeable. A reckless manufacturer would be able to discharge the injuries she caused to victims that she liked, or even those that she was indifferent to, but not to those that she hated.

The creation of a totally new exception to discharge subsequent to the enactment of the Bankruptcy Code provides further evidence that Congress specifically intended that §523(a)(6)'s exception to discharge be limited to intentional torts. The addition of §523(a) subsection (9) excepts debt from discharge incurred through drunk driving. Had Congress been of the opinion that a "general intention to cause injury" standard was the proper interpretation of the "willful and "malicious" language in §523(a)(6), then there would have been no need to enact a new exception dealing with drunk driving.

Prior to the enactment of §523(a)(9), the prevailing view was that debts based on drunk driving liability were not excepted from discharge unless it could be shown that the debtor intended to cause the resulting injury. *See Cassidy v. Minihan*, 794 F.2d 340, 343 (8th Cir. 1986). Essentially, these cases held that while the act of drinking may be intentional, it does not follow that all debtors who injure others while driving drunk have done so with an intent to inflict injury. Rather, it is more common that such accidents fall within the "reckless disregard" concept of tort liability.

For compelling policy reasons, Congress reacted to this line of reasoning. It is the way in which Congress responded that is of great significance to this case. As a sign that Congress did not believe that drunk

driving debts are necessarily the product of a "willful and malicious injury" and as an affirmance that §523(a)(6) does not cover injuries resulting from the reckless disregard of the debtor, Congress enacted this new, stand-alone exception to discharge at subsection (9).

B. Review by this Court is necessary to ensure that the lower courts of appeal are not taking the law in an improper direction.

If the preliminary determination of an intentional tort as announced by this Court in *Kawaauhau* is no longer required and the new relaxed standard announced by the Ninth Circuit that a "general intention to cause injury" is sufficient, future determinations will be made on an *ad hoc* basis and will render inconsistent results, increasing overall litigation. The Ninth Circuit's new standard also contradicts its own earlier published decision in *Lockerby v. Sierra*, 535 F.3d 1038 (9th Cir. 2008). Previously, the Ninth Circuit was following *Kawaauhau*.

In *Lockerby*, Glenn Lockerby sued his attorney Alexander Sierra for legal malpractice. The parties eventually entered into a settlement agreement which Sierra later breached. After Sierra filed a Chapter 7 petition, Lockerby filed an adversary complaint seeking a judgment of nondischargeability of the pre-petition claim for breach of the settlement agreement pursuant to 11 U.S.C. §523(a)(6). The bankruptcy court found the debt to be nondischargeable, determining Sierra's

conduct constituted intentional harm "without any legitimate cause." The district court affirmed and "expressly concluded that tortious conduct was not required for a claim under §523(a)(6)." *Id.* at 1040. Sierra appealed.

The Ninth Circuit decided whether Lockerby's unsecured, pre-petition claim for breach of contract was nondischargeable under 11 U.S.C. §523(a)(6). The court began its inquiry from "the proposition that tortious conduct is a required element for a finding of nondischargeability under §523(a)(6)" relying on the analysis by the *Jercich* Court (*In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001) which undertook a two-part inquiry to determine whether a breach of contract rendered a debt excepted from discharge, "first examining whether the debtor's conduct was 'tortious,' and then asking whether the debtor's conduct was both 'willful' and 'malicious.'" *Lockerby* at 1040 to 1041. The court noted in footnote 2 that several other cases "confirm that tortious conduct is a required element for a finding of willful and malicious conduct. *See, e.g., Peklar v. Ikerd (In re Peklar),* 260 F.3d 1035, 1038 (9th. Cir. 2001) (citing bankruptcy cases that hold that §523(a)(6) is limited to **intentional torts**)." *Id.* at 1041. (Emphasis is in original).

After acknowledging the Supreme Court's reasoning in *Kawaauhau* that "appears to mandate a tortious conduct requirement," the court determined that conduct can only be"tortious if it constitutes a tort under state law." *Id* at 1042. The court further determined that "[c]onflating tortious conduct with intent to injure also conflicts with core principles of

bankruptcy law and its underlying legislative scheme . . . Such an interpretation of the statute would conflict not only with the 'fresh start' policy at the heart of the Bankruptcy Code, but also with the statutory scheme itself." *Id.* at 1042.

Once the court "determined that state-specific tortious conduct is required under §523(a)(6)" it reasoned it could only affirm the district court if the debtor "engaged in conduct that would constitute a tort under Arizona law . . . The conduct at issue here involves an 'ordinary debt,' and the conduct would not be tortious under Arizona law . . ." *Id.* at 1043.

Lockerby argued that the breach of contract is "intentional" if it is "accompanied with knowledge that a person is bound by an agreement and without just cause chooses to ignore it with consequent harm to the [other] party." The court disagreed, reasoning that "lack of just cause" does not render a breach of contract "tortious" under the law of any state. *Id* at 1043.

The Court concluded that since "Sierra's breach of contract would not give rise to a tort action under Arizona law . . . it was not 'willful and malicious under §523(a)(6).'" *Id.* at 1043. The district court' s decision was reversed, the bankruptcy court's judgment was vacated and the case was remanded for further proceedings.

Thus, the *Lockerby* court after first determining that the pre-petition debt for breach of contract was not based an intentional tort, concluded that debtor's conduct could not be willful, nor malicious.

The new relaxed standard announced by the Ninth Circuit in this case that only a "general intention

to cause injury" is required, provides no effective guidance to the bankruptcy trial courts and invests the individual trial judge with the ability to mandate nondischargeability on an *ad hoc* basis as he or she sees fit. [7]

C. A conflict has now arisen between the Ninth Circuit's decision and post-*Kawaauhau* decisions of other lower courts, creating an intercircuit conflict which must be settled by this Court.

For the past twelve years post-*Kawaauhau,* an examination of intercircuit law reveals the following decisions in strict adherence to the rule announced by this Court:

" . . . The Eighth Circuit Court of Appeals in *Geiger* provides similar guidance which is quite compelling, especially in light of the Supreme Court's affirmance of said decision in *Kawaauhau:* [T]he word 'intentional,' by itself, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts . . . The Court finds such reasoning persuasive." *In re Kidd* (March, 1998) 219 B.R. 278, 285. (Montana). In *Kidd*, the court first identified the existence of the intentional

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[7] Justice Richard R. Clifton, one of the three-justice panel that decided *Lockerby* (holding that the presence of an intentional tort is necessary for nondischarge) was also a member of the panel in the instant matter, upholding the district court's published opinion that an intentional tort was not required.

tort of conversion, yet still determined the debt stemming from the conversion dischargeable because the debtor did not act willfully, nor maliciously in the conversion.

"Thus, in accordance with the Supreme Court, the interpretation of §523(a)(6) is confined to an intentional tort standard." *In re Powers* (October, 1998) 227 B.R. 73, 76 (Virginia). In *Powers* the parties stipulated that the debtor's conversion of collateral was tortious. After the court first identified the existence of the intentional tort, it determined that the debt stemming from the conversion was dischargeable because the debtor did not intend the injury.

"A judgment for conversion [an intentional tort] under California law therefore does not, without more, establish that a debt arising out of that judgment is non-dischargeable under §523(a)(6)" and " It does not necessarily decide that the defendant has caused 'willful and malicious injury' within the meaning of § 523(a)(6)." *Peklar v. Ikerd* (9th Cir. 2001) 260 F.3d 1035,1039. In *Peklar,* because the debtor relied on advice of counsel in exercising dominion over the property of the creditor, and although she committed the tort of conversion, the court determined that her conduct was at "worst negligent, and at best innocent," thus the debt stemming from the conversion was dischargeable. [8]

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[8] Similar to status of the debtor in *Peklar*, Petitioner was not an attorney and followed advice of counsel in filing and pursuing her FEHA civil rights action in state court.

"In 1998, the Supreme Court clarified that the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'" *Ditto v. McCurdy* (9th Cir. 2007) 510 F.3d 1070, 1076. In *Ditto*, the debt stemmed from a medical malpractice judgment Jane Ditto received against her former physician McCurdy for several botched breast augmentation surgeries. She did not plead an intentional tort, such as battery, in the state court action, but rather a negligence cause of action. Even so, the court determined that "In order to qualify for the §523(a)(6) 'willful and malicious' exception to discharge, therefore, the debtor must have acted with either the desire to injure or a belief that injury was substantially certain to occur. (footnote omitted) There is no evidence in the record that might lead a trier of fact to conclude that McCurdy had any such desire or belief." *Id.* at 1078.

"The meaning of 'willful' under § 523(a)(6) is controlled by the Supreme Court's decision in *Kawaauhau v. Geiger* . . . Like the en banc Eighth Circuit decision it affirmed, the Court relied on the Restatement (Second) of Torts, observing that 'the [§ 523](a)(6) formulation triggers in the lawyer's mind the category 'intentional torts . . . " *In re Patch* (8th Cir. 2008) 526 F.3d 1176, 1180. In this tragic case from the Eighth Circuit, the representative of her son's estate, Blocker, sued Denise Patch for the wrongful death of her son, Dillon, at the hands of Patch's live-in boyfriend. The child was horribly abused and beaten to his death while Patch stood by and did nothing to prevent the abuse and ultimate death of the child. The court determined that "[t]he plain language of

§523(a)(6) requires courts applying the exemption to first determine exactly what 'injury' the debt is 'for' and then determine whether the debtor both 'willful[ly] and malicious[ly]' caused that 'injury.' Here, the specific debt Patch seeks to discharge is her unliquidated obligation to Blocker in the wrongful-death action and the injury that gives rise to that debt is Dillon's wrongful death." *Id.* at 1181. After analyzing the entire record as a whole, the court concluded that it "could not lead a rational trier of fact to find that Patch either desired to bring about Dillon's death as a result of her conduct or was substantially certain that Dillon's death would result from her conduct, "and concluded "as a matter of law that Patch's unliquidated debt in the wrongful-death action is not "for willful. . . injury." *Id.* at 1183. The debt was deemed dischargeable. Because the court concluded that Patch did not act "willfully," it did not analyze the "malicious" requirement of the statute. See *Patch* at 1180, fn 2.

The instant Ninth Circuit ruling that nondischargeability under 11 U.S.C. § 523(a)(6) is <u>not</u> initially conditioned on an intentional tort, but rather upon a "general intention to cause injury" has placed its decision squarely within the reasons for granting certiorari.

D. The mere filing and pursuit of a failed civil rights lawsuit, in and of itself, which results in an attorney fee award to a prevailing defendant under California Government Code §12965 does not satisfy the "willful and malicious injury" exception to

discharge. The Ninth Circuit's approval of the district court's published opinion holding otherwise will have a profoundly chilling effect on future civil rights litigation.

The Ninth Circuit has equated the California standards used to issue fee awards to prevailing defendants of FEHA litigation (California Govt. Code § 12965(b)) with the heightened standards required by 11 U.S.C. § 523(a)(6) and held that adjudication of the former demands summary adjudication of the later [9].

FEHA is the principal California statute prohibiting employment discrimination covering employers, labor organizations, employment agencies, apprenticeship programs and any person or entity who aids, abets, incites, compels, or coerces the doing of a discriminatory act. It prohibits employment discrimination based on race or color; religion; national origin or ancestry, physical disability; mental disability or medical condition; marital status; sex or sexual orientation; age, with respect to persons over the age of 40; and pregnancy, childbirth, or related medical conditions.

Under California law, prevailing defendants may recover attorney's fees under Cal.Gov.Code §12965

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[9] In this case, the only allegation presented by Respondents in state court was that the Petitioner acted "frivolously", thus, the district court's opinion approved by the Ninth Circuit is reduced to a holding that a "frivolous" FEHA claim resulting in an attorney fee award to a prevailing defendant is a nondischargeable debt under § 523(a)(6).

"only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious."[10] *Mangano v. Verity, Inc.*, 167 Cal.App.4th 944, 949, 84 Cal.Rptr.3d 526, 529. This Court set forth this standard in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648, a federal discrimination action. This court affirmed that a prevailing defendant cannot obtain attorney's fees unless the court finds the claim "frivolous, unreasonable, or groundless."

It is axiomatic that "frivolous, unreasonable, or groundless" is not synonymous with "willful and malicious". If Congress had intended acts meriting civil rights attorneys fees orders to be synonymous with non-dischargeable acts under 11 U.S.C. § 523(a)(6), they would have used the same terms in both. It is inconceivable to equate a frivolous claim for sexual harassment or an unreasonable claim for access to a public restaurant with conversion, assault, or battery.

The published district court opinion stands with the approval of the Ninth Circuit as a weapon for employers to intimidate meritorious future claims. If left uncorrected, Plaintiff's counsel must warn their clients that should the suit be determined frivolous, unreasonable or groundless, the client will never be entitled to a fresh start in bankruptcy. This chilling effect on future civil rights litigation and the ability of

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[10] This is the general standard applied to several civil rights statutes. See also 42 U.S.C. §12101, et. seq; (ADA) and 42 U.S.C. §3601, et. seq. (FHA), which also provide for fee shifting to prevailing defendants based upon standards identical to California's Government Code § 12965.

honest debtors to be relieved from the weight of oppressive indebtedness could not possibly have been the intent of Congress in adopting 11 U.S.C. § 523(a)(6).

E. A judgment debt can not be concluded to be the product of "willful and malicious" wrongdoing if no allegations of willful or malicious conduct were pled, nor litigated, in the underlying suit.

"An issue is actually litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination and is determined." *People v. Carter*, 36 Cal.4th 1215, 1240. "The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992) citing *U. S. v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979), cert. denied, 444 U.S. 979, 100 S.Ct. 480.

As set forth above, no allegation of malice was pled in the underlying state court action, nor was it raised "otherwise" in any post-trial motions by any of the parties. [11] Petitioner's alleged malice did not appear as an issue until after trial was over and post-trial pleadings were closed. Only then did the trial judge volunteer his parting comments in adjudicating

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[11] It is legally impossible for a claim of "malicious prosecution" to be simultaneously litigated with the first action. In a *subsequent* lawsuit that Respondents filed against Petitioner for malicious prosecution, Petitioner prevailed. The Respondents dismissed the suit against her "with prejudice." A copy of that dismissal can be found at **EOR at p. 3078.**

an attorney fee award in response to the Respondents' allegation that the Petitioner had acted "frivolously" and Petitioner's protestations that she had not. Those were the only terms "actually litigated".

The lower courts analyzed Petitioner's objection that "willful" and "malicious" had not been litigated as follows:

Without citation to the record identifying where the issues of "willfulness" and "maliciousness" were actually litigated, the bankruptcy court defined the issue as concerning the Petitioner's "good faith" and "bad faith."

> "This argument is not persuasive. The issue of a responding party's good faith or lack thereof is squarely in play when a court addresses a motion for an award of fees under Government Code Section 12965(b); a court's finding that the respondent's conduct was not in good faith merely underscores the appropriateness of the resulting award. Here the issue of the Debtor's good or bad faith was in play, and the state court's findings were a necessary component of its determination of bad faith." **App. 36-37.**

The district court approved the bankruptcy court's substitution of "actually litigated" with the relaxed term "squarely in play", concluding that Petitioner's conduct "was squarely before the state court on the motion for attorney's fees under Government Code §12965(b)." **App. 16.**

Finally, the Ninth Circuit determined that the issues of Petitioner's "willfulness" and "maliciousness" were "squarely before the court when it determined whether her conduct was unreasonable, frivolous, meritless or in bad faith under Government Code §12965(b)." **App. 3.**

As set forth above, all of Respondents' claims that Petitioner leveled "false allegations" "intentionally interfered with" and acted with "willful, wanton and malicious" intent were disposed of in pre-trial motions or by the jury's finding that Petitioner **did not** act with "malice" and **did not** act with "oppression" in Respondents' Trespass to Chattels cause of action, which was simultaneously tried with the FEHA cause of action.

Only because these lower courts are equating the lower standards for a prevailing defendant in a FEHA cause of action to receive an attorney fee award based on a finding that the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious with the heightened standard of 11 U.S.C. § 523(a)(6) that the losing plaintiff acted "willfully and maliciously," have the lower courts been able to conclude that the underlying debt for attorneys fees in the instant case is nondischargeable. The standards are not equivalent, hence summary judgment was improper.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant her Petition and resolve the intercircuit conflict created by the Ninth Circuit in failing to recognize the mandate announced by this Court in *Kawaauhau* that a judg-

ment debt must first be based upon an intentional tort prior to determining whether the debtor acted "willfully" and "maliciously."

The debt Petitioner seeks to discharge is an attorney fee award in a failed civil rights action. It was not accompanied by any finding of contempt, is not a sanction, nor is it a judgment for any tort under state law, such as malicious prosecution.

If Congress had intended that attorney fee awards in failed civil rights actions be *per se* nondischargeable, it could have added a specific exception for these debts as it did in enacting 11 U.S.C.§ 523(a)(9) for drunk driving damages. Thus, in order for the FEHA awards to be nondischargeable, a tort must be litigated [such as malicious prosecution] and the bankruptcy court must adjudicate whether the debtor acted both "willfully" and "maliciously."

It is respectfully requested that this Court grant the petition and resolve the conflict between the Ninth Circuit, other courts of appeal and this Court, providing uniformity in application of 11 U.S.C.§ 523(a)(6).

Respectfully submitted,

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Dated: March 8, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17338
D.C. No. 2:08-cv-00490 JAM

In the Matter of: MELANIE HUGHES,

Debtor,

MELANIE HUGHES

Appellant,

v.

CLAYEO C. ARNOLD; et al.,

Appellees.

DATE OF JUDGMENT: 03/3/2008

TRIAL JUDGE: HON. ROBERT S. BARDWIL

COURT FROM WHICH APPEALED: UNITED STATES DISTRICT COURT, EASTERN DISTRICT, AFFIRMING A JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT

ATTORNEYS FOR APPELLANT:	MELANIE HUGHES
ATTORNEYS FOR APPELLEES:	GREGORY J. HUGHES AMELIA RYAN PRITCHARD
NATURE OF THE CASE:	CIVIL - BANKRUPTCY ADVERSARY PROCEEDING
DISPOSITION:	AFFIRMED-10/08/2009
PETITION FOR REHEARING EN BANC FILED:	10/21/2009
DISPOSITION:	DENIED-12/14/2009
MANDATE ISSUED:	12/22/2009

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted September 14, 2009 **

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

BEFORE: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges:

¶1 Melanie Hughes, an attorney, appeals pro se from the district court's judgment affirming the bankruptcy court's partial summary judgment that her debt to defendants was nondischargeble in bankruptcy pursuant to 11 U.S.C. § 523(a)(6). We have jurisdiction pursuant to 28 U.S.C. § 158(d). We review de novo the district court's decision on appeal from a bankruptcy court and the bankruptcy court's decision to grant summary judgment. *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007), and we affirm.

¶2. The bankruptcy court did not err when it granted summary judgment on the nondischargeability of Hughes's debt based on her willful and malicious conduct. *See* 11 U.S.C. § 523(a)(6) (providing for exceptions to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity").

¶3. Contrary to Hughes's contentions, the bankruptcy court properly gave preclusive effect to the state court order awarding attorney's fees because the issue of Hughes's willfulness and maliciousness was squarely before the court when it determined whether her conduct was unreasonable, frivolous, meritless, or in bad faith under California Government Code § 12965. *See Mangano v. Verity, Inc.*, 84 Cal.Rptr.3d 526, 529 (Cal. Ct. App. 2008) (explaining that prevailing defendants may recover attorney's fees under Cal. Gov. Code § 12965 "only if the plaintiff's lawsuit is

deemed unreasonable, frivolous, meritless, or vexatious"); *People v. Carter*, 117 P.3d 544, 562 (Cal. 2005) (explaining that an issue is actually litigated when it is properly raised, submitted for determination, and determined).

¶4. Hughes's contention that nondischargeability under 11 U.S.C. § 523(a)(6) is conditioned on an intentional tort, rather than a general intention to cause injury, is equally unavailing. *See Ditto*, 510 F.3d at 1078 (explaining that the critical inquiry is whether the debtor desires to cause consequences of her act, or that she believes the consequences are substantially certain to result from it).

¶5. Hughes's remaining contentions are unpersuasive.

¶6. We grant Hughes's motion to file a page missing from her excerpts of record. The clerk shall file the missing excerpt page received on March 27, 2009.

¶7. We deny Hughes's motion to augment the excerpts of record.

¶8. We grant appellees' motion to strike portions of the excerpts of record.

AFFIRMED.

App. 5

(EOR pp. 3080 to 3094)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-CV-00490 JAM

MELANIE HUGHES,

Appellant,

v.

CLAYEO C. ARNOLD and CLAYEO C. ARNOLD, PROFESSIONAL LAW CORPORATION,

Appellees.

DATE OF JUDGMENT:	03/3/2008
TRIAL JUDGE:	HON. ROBERT S. BARDWIL
COURT FROM WHICH APPEALED:	UNITED STATES BANKRUPTCY COURT
ATTORNEYS FOR APPELLANT:	MELANIE HUGHES
ATTORNEYS FOR APPELLEES:	GREGORY J. HUGHES AMELIA RYAN PRITCHARD

NATURE OF THE CASE: CIVIL - BANKRUPTCY ADVERSARY PROCEEDING

DISPOSITION: AFFIRMED-08/11/2008

MOTION FOR REHEARING FILED: 08/20/2008

DISPOSITION: DENIED-10/8/2008

ORDER DENYING APPEAL AND AFFIRMING BANKRUPTCY COURT'S PARTIAL SUMMARY JUDGMENT ORDER

¶1. Appellant/Debtor Melanie Hughes (" Appellant") appeals the bankruptcy court's granting of partial summary judgment in favor of Appellees/Creditors Clayeo C. Arnold and Clayeo C. Arnold, Professional Law Corporation (collectively "Appellees"). The bankruptcy court ruled that a state court judgment awarding attorney's fees and costs in favor of Appellees and against Appellant was nondischargeable debt under 11 U.S.C. § 523 (a) (6). For the reasons set forth below, the bankruptcy court's decision is AFFIRMED.

I. PROCEDURAL BACKGROUND

¶2. On or about March 14, 2005, Appellant filed a

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[1] Because oral argument will not be of material assistance, the Court orders the matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

petition for relief under Chapter 7 of the Bankruptcy Code, thereby commencing the underlying bankruptcy case. On June 14, 2005, Appellees filed a complaint to determine dischargeability of debts and for denial of discharge, thereby commencing an adversary action requesting that certain debts owed to Appellees be adjudicated as nondischargeable, including a state court judgment awarding attorney's fees and costs ("attorney's fees" award) to Appellees following a jury verdict in their favor in a sexual harassment action brought by Appellant. [1]

¶3. On May 22, 2007, the parties filed cross-motions for summary judgment. On August 24, 2007, Appellees summary judgment motion was granted to the extent it sought a determination that the attorney's fee award was nondischargeable debt under § 523 (a) (6) ("Partial Summary Judgment Order"). On September 4, 2007, Appellant filed a notice of appeal of the Partial Summary Judgment Order and a statement of election to have the appeal heard by the district court. The district court subsequently granted Appellees' motion to dismiss the appeal on the ground that the Partial Summary Judgment Order was not a final judgment because it adjudicated fewer than all the claims in the adversary proceeding.

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[1] Appellees' first two causes of action in their complaint seek a determination that the attorney's fee award is nondischargeable debt under § 523 (a) (6) as a willful and malicious injury. Appellees' third and fourth causes of action seek to deny Appellant's discharge, pursuant to 11 U.S.C. § 727 (a), for failure to keep adequate records and for concealing property with the intent to hinder, delay, or defraud creditors.

¶4. In the meantime, on October 3, 2007, Appellees filed two motions in the adversary proceeding: (1) a motion seeking a determination of the amount owed by Appellant on the nondischargeable attorney's fee award; and (2) a motion for relief from the automatic stay. On February 19, 2008, the bankruptcy court issued an order determining that the amount owed on the attorney's fee award to be $122,702.37 to Clayeo C. Arnold and $190,237.01 to Clayeo Arnold, Professional Law Corporation ("Order Determining Amounts"). On March 3, 2008, the bankruptcy court entered an order certifying the Partial Summary Judgment Order as a final order, as supplemented by the Order Determining the Amounts, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. [2] Upon entry of the final appealable judgment, the bankruptcy court lifted the automatic stay precluding execution on the nondischargeable attorney's fee award. Appellant then filed a notice of appeal. On March 24, 2008, the bankruptcy court denied Appellant's motion to stay proceeding pending appeal. Appellant then sought an order from this Court staying the proceedings pending appeal. On May 14, 2008, Appellant filed her opening brief with this Court. On May 22, 2008, this Court denied Appellant's motion to stay proceedings pending appeal. On May 29, 2008, Appellees filed their

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[2] Rule 54 (b) provides in relevant part: When an action presents more than one claim for relief - - whether as a claim, counterclaim, crossclaim, or third-party claim - - or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all claims or parties only if the court expressly determines that there is no just reason for delay. Fed.R.Civ.P. § 54 (b).

opening brief.

II. OPINION

A. Standard of Review

¶5. An appellant may petition the district court for review of a bankruptcy court's decision. Fed. R. Bankr. P. 8013. A district court has jurisdiction to review a bankruptcy court's decision pursuant to 28 U.S.C. § 158 (a). A district court's standard of review over a bankruptcy court's decision is the same as that used by an appellate court over a district court's decision. Towers v. Boyd (In re Boyd), 243 B.R. 756, 759 (N.D. Cal. 2000). Wether a particular type of debt is nondischargeable presents mixed issues of law and fact and is reviewed *de novo*. Carrillo v. Sue (In re Su), 290 F.3d 1140, 1142, (9th Cir. 2002). Legal conclusions are reviewed on a *de novo* basis, and factual determinations are assessed pursuant to a "clearly erroneous" standard. Murray v. Brammer (In re Bammer) 131 F. 3d 788, 792 (9th Cir. 1997) (en banc).

B. Analysis

¶6. This appeal presents two issues. The first question is whether an attorney's fee award is nondischargeable debt under § 523 (a) (6). The second question is whether the bankruptcy court properly relied on the state court's factual findings in determining that the attorney's fees award is nondischargeable debt under § 523 (a) (6). These questions are addressed individually below.

1. Nondischargeable Debt Under § 523 (a) (6)

¶7. As to whether the attorney's fees award is nondischargeable debt under § 523 (a) (6), the question is whether the debt arising from the state court judgment falls within the ambit of § 523 (a) (6). As to be expected, the parties advance opposing positions. Appellant contends that the attorney's fees award is dischargeable debt under § 523 (a) (6) because the state court judgment was not based upon an intentional tort. Appellees, on the other hand, contend that the attorney's fee award is nondischargeable debt under § 523 (a) (6) because Appellant initiated and prosecuted the state court action with the intent to injure, and therefore the attorney's fees award arose out of "willful and malicious injury" within the meaning of § 523 (a) (6).

¶8. Section 523 (a) (6) excepts from discharge any debt "for wilful and malicious injury by the debtor to another entity or to the property of another entity." In order to qualify for the § 523 (a) (6) 'willful and malicious' exception to discharge . . . the debtor must have acted with either the desire to injury or a belief that injury was substantially certain to occur." Ditto v. McCurdy, 510 F.3d 1070, 1078 (9th Cir. 2007). The "willfulness" and "maliciousness" prongs of § 523 (a) (6) are analyzed separately. In re Su , 290 F.3d at 1146. A creditor must demonstrate nondischargeability by a preponderance of the evidence. Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9 th Cir. 2005).

¶9. An injury is "willful" under § 523 (a) (6) if the debtor intends the consequences of his action. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). The word "willful" indicates "a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury." Id. (emphasis in original). The willful injury requirement under § 523 (a) (6) is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." In re Su, 290 F. 3d at 1142. The focus is on the debtor's state of mind at the time the injurious action is taken: either the debtor must have the subjective intent to cause harm, or have the subjective belief, i.e., actual knowledge, that harm is substantially certain to result. In re Su, 290 F.3d at 1145-46 ("The subjective standard correctly focuses on the debtor's state of mind and precludes application of § 523 (a) (6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain."). Subjective intent or substantial certainty may be inferred from all of the facts and circumstances established. Nahman v. Jacks (In re Jacks), 266 B.R. 728, 742 (9th Cir. BAP 2001); See also In re Su, 290 F.3d at 1147 n. 6 ("[T]he bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.").

¶10. The malicious prong of § 523 (a) (6) is separate and distinct from the willful prong. In re Su, 290 F.3d at 1146. The "maliciousness" prong requires proof of " (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just

cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). "[I]t is the wrongful act that must be committed intentionally rather than the injury itself." In re Sicroff, 401 F.3d at 1106.

¶11. In the present case, the bankruptcy court found that the state court judgment awarding attorney's fees is nondischargeable debt under § 523 (a) (6). In so finding, the bankruptcy court concluded that Appellant's conduct in initiating and prosecuting her sexual harassment claim against Appellees was willful and malicious insofar as her conduct was unreasonable, frivolous, vexatious and in bad faith. In reaching this conclusion, the bankruptcy court relied upon the state court's finding that Appellant brought her sexual harassment claim "in bad faith and with the [Debtor's] declared objective 'to bring Clay [Arnold] down,' " and that she knew from the outset that "there was no reasonable basis" for this claim. The bankruptcy court further relied on the state court's finding that Appellant's "cl aim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold." Appellant maintains that the bankruptcy court erred in reaching this conclusion because nondischargeable debt under § 523 (a) (6) is confined to debt arising out of an intentional tort. The Court disagrees. Nondischargeable debt under § 523 (a) (6) is not limited to debt arising out of an intentional tort; rather, § 523 (a) (6) excepts from discharge any debt for "willful and malicious injury by the debtor." See e.g., In re Jercich, 238 F3d at 1208-09 (debt owed to employee arising out of state court

judgment for unpaid wages was nondischargeable debt under § 523 (a) (6) because employer's nonpayment of wages constituted tortious conduct insofar as he both knew that he owed wages to his employee and that his failure to pay those wages would, with substantial certainty, harm his employee); Ball v. A.O. Smith Corp., 451 F.3d 66 (2d Cir. 2006) (debt arising out of sanction award against debtor-attorney in an underlying action was nondischargeable debt under § 523 (a) (6) because the conduct giving rise to the sanction award was willful and malicious insofar as the debtor-attorney initiated that action unreasonably and for an improper purpose). Here, because the conduct giving rise to the attorney's fees award against Appellant was willful and malicious, the attorney's fee award is excepted from discharge under § 523 (a) (6). As the bankruptcy court found, the underlying attorney's fee award rested on the Appellant's bad faith conduct in knowingly initiating and prosecuting a groundless sexual harassment claim against Appellees motivated by the malicious desire to cause harm. In so finding, the bankruptcy court relied upon the state court's specific factual findings, namely that Appellant violated Government Code § 12965(b), which required a finding that Appellant's sexual harassment claim was unreasonable, frivolous, meritless, vexatious or in bad faith. Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, 91 Cal.App.4th 859, 865-66 (2001); see also Bond v. Pulsar Video Productions, 50 Cal.App.4th 918, 925 (1966) (attorney's fees under § 12965(b) can be awarded upon a finding of bad faith). In this Court's opinion, the state court's factual findings are sufficient to show that Appellant's

conduct in initiating and prosecuting her sexual harassment claim constituted tortious conduct, resulting in willful and malicious injury. [3] Accordingly, because the debt in this case arose from willful and malicious injury caused by the Appellant's tortious conduct, it is excepted from discharge under § 523 (a) (6). This determination is consistent with the fundamental policy of bankruptcy law to only grant discharges to the honest but unfortunate debtor. See In re Jercich, 238 F.3d at 1206.

2. Bankruptcy Court's Reliance on the State Court's Factual Findings

¶12. As to whether the bankruptcy court properly relied on the state court's factual findings in determining that the attorney's fee award is nondischargeable debt under § 523 (a) (6), the question before the Court is whether the bankruptcy court properly applied the doctrine of collateral estoppel.

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[3] An action for the tort of malicious prosecution lies where a prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 292 (2006). Here, the record indicates that Appellant commenced the underlying action and it was pursued to a legal termination favorable to Appellees. The record also indicates that Appellant commenced the underlying action unreasonably for the improper purpose of causing harm. Accordingly, the Court finds that the record contains sufficient evidence demonstrating that Appellant engaged in tortious conduct.

¶13. Principals of collateral estoppel apply in discharge exception proceedings under § 523 (a). Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003); see also Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991) (a party may invoke collateral estoppel to preclude relitigation of the elements necessary to meet a § 523 (a) exception). "Coll ateral estoppel is applicable if the facts established by the previous judgment" - - in this case, a state court judgment-"meet the requirements of nondischargeability." Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210, 215 (3d Cir. 1997). "Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the preclusive effect of a state court judgment in a subsequent bankruptcy proceeding is determined by the preclusion law of the state in which the judgment was issued." Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

¶14. In California, "[c]ol lateral estoppel precludes relitigation of issues argued and decided in prior proceedings." Lucido v. Superior Court, 51 Cal.3d 335, 341 (1990). Courts will only apply collateral estoppel if the following threshold requirements are met: (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; (2) this issue must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Id. In addition to these factors courts consider whether the party against whom the

earlier decision is asserted had a "full an fair" opportunity to litigate the issue. Roos v. Red , 130 Cal.App.4th 870, 880 (2005). If all of the threshold requirements are met, the court then must decide whether application of collateral estoppel would "further the policy interests underlying the doctrine." Lucido, 51 Cal.3d at 342-343. "Those policies are (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. Murphy v. Murphy, 164 Cal.App.4th 376, 404 (2008) (internal quotation marks omitted).

¶15. In the present case, Appellant only contends that the first, second and third requirements have not been met. Specifically, Appellant maintains that collateral estoppel does not apply because the issue of whether her conducting initiating and prosecuting her sexual harassment claim resulted in willful and malicious injury was never actually litigated or necessarily decided by the state court. The Court disagrees. The propriety of Appellant's conduct in pursuing her sexual harassment claim was squarely before the state court on Appellees' motion for attorney's fees under § 12965(b), which required the court to determine whether Appellant's conduct was unreasonable, frivolous, meritless, vexatious or in bad faith. See People v. Carter, 36 Cal.4th 1215, 1240 (an issue is actually litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined). Appellant appealed the

attorney's fee award, and thus had a "full and fair opportunity to litigate this issue. As to the policy interests underlying the doctrine of collateral estoppel, the Court finds that the bankruptcy court properly precluded relitigation of the elements necessary to except a debt from discharge under § 523 (a) (6). The application of collateral estoppel under the circumstances furthers the doctrine' s underlying fundamental principles by promoting judicial economy, preventing the possibility of inconsistent judgments and avoiding harassment of Appellees with repeated litigation. Indeed the very same conduct that was fully assessed by the state court and resulted in a judgment in favor of Appellees is the basis for the debt Appellees sought to except from discharge in the bankruptcy court. Accordingly, the Court finds that the bankruptcy court properly gave preclusive effect to the state court's factual findings underlying the attorney's fee award. To the extent Appellant argues that the bankruptcy court erred in determining the amount of debt excepted from discharge under § 523 (a) (6) by improperly giving preclusive effect to the state court's factual findings, the Court disagrees. See Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 872 (9th Cir. 2005) ("The classic example of the proper use of issue preclusion in discharge proceeding is when the amount of the debt has been determined by the state court and reduced to judgment."). [4]

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[4] Finally, to the extent Appellant argues that the state court did not have jurisdiction to determine the amount of debt excepted from discharge under § 523 (a) (6), the Court finds this argument to lack merit. The record reveals that the

III. ORDER

¶16. For the reasons set forth above, the bankruptcy court's partial summary judgment order is AFFIRMED.

IT IS SO ORDERED.

Dated: August 11, 2008

/s/ John A. Mendez
JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

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bankruptcy court, not the state court, made this determination.

(EOR at pp. 235 to 251)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 05-22777-D-7
Adv. Pro. No. 05-2225-D
Docket Control No. ARP-4

In re:

MELANIE HUGHES,

Debtor.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION,

Plaintiffs,

v.

MELANIE HUGHES

Defendant.

(Filed August 24, 2007)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

¶1. On May 22, 2007, Clayeo C. Arnold and Clayeo Arnold, Professional Law Corporation, filed a Motion for Partial Summary Judgment, bearing Docket Control No. ARP-4 (the "Motion"). [1] For the reasons set forth below. The court will grant the Motion in part.

1. INTRODUCTION

¶2. On March 14, 2005, Defendant Melanie Hughes (the "Debtor") filed a petition for relief under chapter 7 of the Bankruptcy Code. On June 14, 2005, Clayeo C. Arnold and Clayeo C. Arnold, Professional Law Corporation ("Plaintiffs"), filed a Complaint to Determine Dischargeability of Debts and for Denial of Discharge (the " Complaint"), thereby commencing the above-captioned adversary proceeding. The factual background of this matter and the allegations made in the Complaint are set forth generally in the court's memorandum decision on the Debtor's motion for summary judgment, filed July 10, 2007, and will not be repeated here. As in that decision, references herein to the state court action will be to Rieger v. Arnold, et al.,

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[1] On the same date, Defendant Melanie Hughes filed a Motion for Summary Judgment. The court' s decision on that motion was filed July 10, 2007.

Sacramento County Superior Court Case No. 97AS03390, and "the attorney's fee award" will refer to the state court's award of attorney's fees and costs in favor of the Plaintiffs and against the Debtor.

¶3. With the Motion, the Plaintiffs filed a number of exhibits, a declaration of Clayeo C. Arnold, and as required by Local Bankruptcy Rule 7056-1(a), a separate statement of undisputed facts.

¶4. On June 6, 2007, the Debtor filed a memorandum of points and authorities in opposition to the Motion ("Opposition"), together with exhibits, a declaration of Melanie Hughes, a response to the Plaintiff' s statement of undisputed facts, and a statement of undisputed facts in support of the Opposition.

¶5. On June 13, 2007, the Plaintiffs filed a reply to the Opposition.

¶6. On June 20, 2007, the Motion came before the court for hearing, counsel appeared and presented oral argument, and the matter was submitted.

¶7. In the Motion, the Plaintiffs seek an order determining that the attorney's fee award is not dischargeable, pursuant to 11 U.S.C. § 523 (a) (6), and in addition, an order that any debt resulting from the Plaintiffs' malicious prosecution action presently pending in state court is nondischargeable. The Motion is denominated a motion for partial summary judgment, because it contains no request for relief with

respect to the Plaintiffs' third and fourth causes of action.

¶8. The Plaintiffs rely on the following findings by the trial judge set forth in the attorney's fee award. (References to Rieger are to the Debtor, whose name at the time was Melanie Rieger.)

> Attorney's fees and costs are claimed by Arnold, [his law] corporation and Artenstein [the law corporation's office manager and another defendant in the Debtor's state court action] pursuant to Government Code section 12965 upon a contention that Rieger's claim was frivolous, unreasonable and without foundation. That is the most benign assessment that can be made of Rieger' s claim. It was also brought in bad faith and with the claimant' s declared objective "to bring Clay down". It was initiated and prosecuted by the claimant with full knowledge that she was the initiator of and eager participant in, almost all of the sex-oriented horseplay and other gender focused activity that occurred in her workplace or in the company of her coworkers. She knew, from the outset of the litigation, that there was no reasonable basis upon which a claim could be made that she was offended by any of that activity. Her claim was so patently groundless from the outset that it has

> been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold. Arnold, corporation and Artenstein are entitled to attorney's fees and costs pursuant to Government Code section 12965.

Order disposing of Motions Related to Costs and Attorney's Fees, Plaintiffs' Exhibits filed May 22, 2007, Ex. J, 2-3.

¶9. The gist of the Plaintiffs' argument is that the doctrine of collateral estoppel, now known as issue preclusion, applies to make the state court's findings, quoted above, binding on this court in this adversary proceeding, and that as a result of the those findings, this court must find the attorney's fee award to be nondischargeable, pursuant to 11 U.S.C. § 523 (a) (6).

¶10. The Debtor responds that the state court' s findings do not meet the requirements for application of issue preclusion. The Debtor's several arguments will be explored below.

II. ANALYSIS

¶11. This court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157 (b) (1). The Motion is a core proceeding under 28 U.S.C. § 157 (b) (2) (I). The Motion was brought pursuant to Federal Rule of Bankruptcy Procedure 7056, which makes applicable Federal Rule of Civil Procedure 56.

A. Standards for Summary Judgment

¶12. Where a motion for summary judgment is before the court, the court is to render judgment for the moving party where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 ©. The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986).

¶13. Once the moving party has met its initial burden, the non-moving party must show specific facts showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 Ct. 2505, 2514 (1986). Under Rule 56, the court also has authority to make an order specifying those material facts that appear without substantial controversy, and such facts are deemed established for purposes of trial. Fed. R. Civ. P. 56(d).

B. Willful and Malicious Injury

¶14. The Bankruptcy Code excepts from discharge a debt for willful and malicious injury by the debtor to the person or property of another. 11 U.S.C. § 523 (a)(6). The "willful" and "malicious" requirements are examined separately. Carrillo v. Su (In re Su) , 290 F.3d 1140, 1146 (9th Cir. 2002). The "willful" require-

ment is satisfied "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." 290 F.3d at 1142. The "malicious" test is met when the act is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). "[I]t is the wrongful act that must be committed intentionally rather than the injury itself." Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005), citing Murray v. Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part definition does not require a showing of an intent to injure, but rather it requires only an intentional act which causes injury.")

¶15. In order to find for the Plaintiffs on this summary judgment motion, the court must be satisfied that both these tests are met by the state court's findings quoted above, and that this court should rely on those findings as preclusive in this proceeding.

C. Issue Preclusion

¶16. The doctrine of issue preclusion applies in dischargeability proceedings under 11 U.S.C. § 523 (a). Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S. Ct. 654 (1991). Simply stated, "[i]f a state court would give preclusive effect to a judgment rendered by courts of that state, then the Full Faith and Credit Statute (28 U.S.C. § 1738) imports the same consequence to an action in federal court based on the same award."

Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 824 (9th Cir. BAP 2006), citing McDonald v. City of W. Branch, 466 U.S. 284, 287, 104 S. Ct. 1799, (1984); Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

¶17. In other words, in considering whether to give preclusive effect to a state court's judgment, the bankruptcy court looks to that state's law of issue preclusion. Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002), citing Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Under California law, the elements of the doctrine are these:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding.
>
> Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collat-

> eral estoppel should be applied in a particular setting. . . . Accordingly, the public policies underlying collateral estoppel - preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation - strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.

Lucido v. Superior Ct., 51 Cal. 3d 335, 341-43 (1990).

D. Summary Judgment as to the Attorney's Fee Award

¶18. The Plaintiffs rely principally on Nolan v. Smith (In re Smith), 321 B.R. 542 (Bankr. D. Colo. 2005). In Nolan, the state court had awarded the plaintiffs their attorney's fees and costs under a Colorado statute similar to California Government Code section 12965 (b). The debtors argued, as does the Debtor here, that the state court made no findings of an intentional, willful and malicious act, as required by 11 U.S.C. § 523 (a) (6). The bankruptcy court disagreed, concluding instead that the state court's findings " adequately demonstrate that the Smiths' underlying conduct and their conduct in defending the State Court action was meritless, intentional and willful." 321 B.R. at 548 n.9.

¶19. The Debtor argues the Smith is distinguishable from this case. First, in Smith, the state court made findings that the debtors' conduct giving rise to the state court action was "intentional, willful, concerted and, in the end, indefensible" (see 321 B.R. at 549). Second, the Smith debtors admitted in the bankruptcy court that such conduct constituted a willful and malicious injury. See 321 B.R. at 547. By contrast, the Debtor in this case vehemently denies that any of her conduct, either giving rise to or during the pendency of the state court action, was willful or malicious. And the state court made no findings that her conduct giving rise to the state court action was willful and malicious. Thus, Smith is not on point.

¶20. However, here, the state court did find that the Debtor's conduct in filing and prosecuting the state court action was "in bad faith and with the [Debtor's] declared objective 'to bring Clay [Arnold] down,'" and that she knew from the outset that there was no reasonable basis" for her claim. "Her claim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold."

¶21. The question is whether this court should apply the doctrine of issue preclusion to these findings. The Debtor argues against issue preclusion, contending the (1) the issue of willful and malicious conduct on her part was not actually litigated in the state court, (2) the court's findings were dicta, did not amount to express findings, and are not determinative for purposes of 11 U.S.C. § 523 (a) (6), and (3) the Debtor's

conduct could not have been willful and malicious because her causes of action survived a motion for nonsuit, and indeed resulted in a $15,000 jury verdict in her favor, because the jury made a specific finding that she had not acted with malice or oppression, and because the California Department of Fair Employment and Housing "authorized" her action.

¶22. On the first point, the Debtor observes that the Plaintiffs' state court complaint against her (which was consolidated with her action against the Plaintiffs for purpose of trial) originally contained causes of action for wrongful intentional conduct, but all those causes of action were dismissed prior to trial. The only cause of action of the Plaintiffs remaining at the time of trial were for trespass to chattels and breach of contract. Thus, the Debtor concludes, "there was no remaining claim for willful or malicious conduct [by] the Debtor." Opposition at 8.

¶23. This argument is a red herring. It does not matter that the Plaintiffs' causes of action against the Debtor for intentional torts were dismissed, because the conduct giving rise to the attorney's fee award was the Debtor's conduct in filing and prosecuting her own causes of action against the Plaintiffs.

¶24. The Debtor's argument that the jury specifically found she had not acted with malice or oppression is similarly misplaced. The jury's finding in that regard was in connection with the Debtor's conduct in interfering with the Plaintiffs' computer database (the trespass to chattels cause of action). Verdict,

Debtor's Exhibits filed May 22, 2007, Ex. D, 7-8. It had nothing to do with the state court's findings, quoted above, which pertain to her conduct in prosecuting her own causes of action.

¶25. This is the crux of the Debtor's argument - - that "there is no underlying tort to which the [attorney' s fee award may attach and become nondischargeable." Opposition at 8:8-10. The argument fails because, as this court concluded in its decision on the Debtor' s motion for summary judgment, Docket Control No. HSM-2, the attorney's fee award was a direct result of the Debtor's conduct in filing and prosecuting her sexual harassment causes of action against the Plaintiffs. The award was not "ancillary" to any other state court award; instead, it was in the nature of a primary debt, resulting directly from the Debtor's decision to file and prosecute her sexual harassment claims. If that conduct was willful and malicious, within the meaning of 11 U.S.C. § 523 (a) (6), the award will be nondischargeable.

¶26. The Debtor next contends that the language in the attorney's fee order went beyond the findings necessary to justify the award, and therefore, constituted non-binding dicta. According to the Debtor, the state court need only have found that her conduct in prosecuting the sexual harassment claims was frivolous, unreasonable, or without merit. Debtor's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed May 22, 2007, at 8:16-18. Thus, the court's remarks about the Debtor's intention "to bring Clay down," and her

"malicious desire to harm Arnold" were nothing more than unnecessary observations.

¶27. In Muegler v. Bening, 413 F.3d 980 (9th Cir. 2005), the court rejected a debtor's argument that a state court jury verdict should not be given issue preclusive effect because applicable state law permitted a finding based upon a lower standard than that required by section 523 (a) (6). The court acknowledged that state law allowed a lower standard, but looked to the actual findings, and concluded that issue preclusion applied. 413 F.3d at 984.

> Although Missouri law allows a jury to find guilt based upon a lower standard than that required by § 523 (a) (6), in this case the Missouri jury instructions regarding culpability clearly required a finding that [the debtor] intended his misrepresentations to harm the Creditors. The jury found that [the debtor] willfully committed fraud, and awarded compensatory damages to the Creditors based upon its finding.

Id.

¶28. This court reaches similar conclusion. In order to award fees to a prevailing defendant under Government Code section 12965 (b), a court must make findings that the Debtor's conduct in prosecuting the action was unreasonable, frivolous, meritless, or vexatious. Cummings v. Benco Building Services, 11 Cal. App. 4th 1383, 1387 (1992), citing Christiansburg

Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694 (1978). The court need not find that the action was brought in bad faith. Cummings, 11 Cal. App. 4th at 1387. However, a section 12965 (b) award may be based on a finding of the plaintiff's bad faith. Bond v. Pulsar Video Prods., 50 Cal. App. 4th 918, 924-925 (1996). "'[N]eedless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.'" Bond, 50 Cal. App. 4th at 925, quoting Christiansburg Garment Co., 434 U.S. at 422 (emphasis added).

¶29. In Saret-Cook v. Gilbert, Kelly, Crowley & Jennett, 74 Cal. App. 4th 1211 (1999), the appellate court examined finding similar to those made in this case; namely, that the plaintiff's "acti ons and tactics in filing and prosecuting this lawsuit were done with subjective bad faith," and the "Plaintiff's motive in filing and prosecuting this lawsuit was to harass Defendants . . ." 74 Cal. App. 4th at 1229. In affirming the fee award, the appellate court concluded that these findings "amounted to much more than only a finding the [the plaintiff's] action lacked merit. Fairly read, [they] also constituted a finding that [the plaintiff's] action was 'unreasonable,' was 'frivolous,' and was 'vexatious.'" Id. At 1229-30.

¶30. Similarly, in this case, the state court's findings concerning the Debtor's motivation in bringing and pursuing her action constitute findings that her actions were unreasonable, frivolous, and vexatious. They also constitute a finding that her conduct was in

bad faith. Without those findings, the order could not stand, and indeed, would not have withstood the Debtor's appeal. This court will not engage in a parsing of the critical paragraph in the order, selecting as essential to the award only those words and phrases that support a more benign "unrea sonable" finding, and omitting as dicta those that support a finding of bad faith. Instead, the court concludes that the state court' s findings, as quoted above, were necessary to its award of fees and costs.

¶31. The Debtor makes several other arguments. First, as support for her conclusion that her prosecution of the state court action could not have been willful and malicious, the Debtor notes that (1) her sexual harassment, wrongful termination, and assault and battery causes of action survived a motion for nonsuit in the state of court, (2) the jury rendered a verdict in her favor for $15,000, and (3) she did not file her complaint until she had received "the appropriate authorization letters from the California Department of Fair Employment and Housing." Opposition at 5:22-26.

¶32. The courts have rejected a bright-line rule that a plaintiff whose claims survive a motion for summary judgment or motion for nonsuit cannot be liable for fees under section 12965(b). Rosenman v. Christensen, 91 Cal.App.4th 859, 866 (2001); Bond v. Pulsar Video Prods., supra, 50 Cal.App.4th at 923.

> Such a rule would unjustifiably shield those plaintiffs who are able to raise a

> triable issue of fact, even thought it be by means of fabricated evidence and false testimony. If the false and unfounded nature of such a plaintiff's claims is revealed at trial, the prevailing defendant should be able to recoup its attorney fees to the extend the plaintiff is able to pay.

Rosenman, supra, 91 Cal. App. 4th at 866.

¶33. "Declarations sufficient to create a triable issue in a summary judgment proceeding may, in the crucible of a trial, be revealed to be spurious and the litigant's claim frivolous, unreasonable and without foundation." Bond, supra, 50 Cal. App. 4 th at 923. Similarly, the Debtor's claims may well have been pursued with the willful and malicious intent to cause injury to the Plaintiffs, despite the fact that those claims survived a motion for nonsuit.

¶34. The court reaches the same conclusion with respect to the jury' s $15,000 verdict in favor of the Debtor. The jury found for the Debtor on her claim that the law corporation failed to take steps to protect her claim that the law corporation failed to take steps to protect her from hostile environment harassment. However it also found against the Debtor on her claim for hostile environment harassment itself. Verdict, Debtor's Exhibits filed May 22, 2007, Ex. D, 1, 3. The state court held as follows: "Since there exists no independent cause of action for failure to protect against hostile environment harassment, the finding favoring the plaintiff [the Debtor herein] upon that

claim cannot be supported and a judgment favoring the defendants, notwithstanding the verdict, is required." Order for Judgment Notwithstanding the Verdict, Plaintiffs' Exhibits filed May 22, 2007, Ex. C.

¶35. Finally, the "right-to-sue" notice issued by the Department of Fair Employment and Housing pursuant to Government Code section 12965 (b) is a prerequisite to the filing of a civil action such as the Debtor's. The issuance of the notice reflects the Department's decision not to issue its own accusation against the employer, at least not within the first 150 days from the filing of the complaint with the Department, and is in no way an endorsement of the Debtor's action.

¶36. Each of these arguments either was or could have been raised in the Debtor's appeal from the state court judgment and attorney's fee order. The appellate court affirmed both in a ruling that is now final; its analysis of the Debtor's arguments regarding the fee order appears at pages 29-33 of the ruling. Decision of the Third District Court of Appeals in Rieger v. Arnold, et al., Case Nos. C034625, C035383, Debtor's Exhibits filed June 6, 2007, Ex. 14. Under the doctrine of issue preclusion, the Debtor is precluded from raising these issues yet again in this court. The Debtor's references in her Opposition to certain evidence admitted at trial after her motions in limine were denied, and her references to the trial court's and appellate court's findings concerning the working environment at the law corporation's office, all having been addressed by both state courts, are also subject to issue preclusion in

this proceeding.

¶37. The court notes that under both federal and California law, the decision to apply issue preclusion to findings of another court is discretionary. See Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 2007 Bankr. Lexis 1250, at *16-*19 (9th Cir. Bap 2007). In particular, in evaluating a California order, the court is to consider "whether imposition of issue preclusion in the particular setting would be fair and consistent with sound public policy." In re Khaligh, supra, 338 B.R. at 824-25, citing Lucido, supra, 51 Cal. 3d at 341-43.

¶38. The court has considered various possible countervailing factors, as suggested in case law (see Lopez, supra, 2007 Bankr. LEXIS 1250 at *16-*19), and in the Restatement (Second) of Judgments §§ 28 (2), (3) & (5), and concludes that applying issue preclusion to the attorney's fee award does not offend notions of fairness or sound public policy. The Debtor has pointed out that the Plaintiffs, in their motion for an award of fees and costs, argued that the Debtor's conduct was unreasonable, frivolous, and without merit; they did not specifically request a finding that such conduct was malicious or in bad faith. See Memorandum of Points and Authorities in Support of Defendants' Joint Motion for Attorneys' Fees and Costs, Plaintiffs' Exhibits filed May 22, 2007, Ex. E. This argument is not persuasive. The issue of a responding party's good faith or lack thereof is squarely in play when a court addresses a motion for an award of fees under Government Code Section 12965

(b); a court's finding that the respondent's conduct was not in good faith merely underscores the appropriateness of the resulting award. Here, the issue of the Debtor's good or bad faith was in play, and the state court's findings were a necessary component of its determination of bad faith.

¶39. Further, the Debtor appealed from the order, and had a full and fair opportunity to challenge the findings that are at issue here. Issue preclusion "bars relitigation of an issue previously decided if the party against whom the prior decision is asserted has 'a full and fair opportunity to litigate that issue in the earlier case.'" Albarran v. New Form, Inc. (In re Albarran), 347 B.R. 369, 385 n. 15 (9 th Cir. BAP 2006), quoting Allen v. McCurry, 449 U.S. 90, 94-95, 101 S. Ct. 411 (1980).

¶40. In sum, the court finds that the six tests for issue preclusive effect of California judgments - (1) identical issue, (2) actually litigated, (3) necessarily decided, (4) in a decision final and on the merits, (5) between the same parties, (6) application of the doctrine fair and consistent with sound public policy - - are met in this case with respect to the attorney's fee order.

E. Summary Judgment as to the Malicious Prosecution Action

¶41. In a action commenced October 17, 2003 in the Sacramento County Superior Court, Case No. 03AS05820, the Plaintiffs seek damages for malicious

prosecution against the Debtor and the attorneys who represented her in the state court action. The complaint appears in the Plaintiffs' Exhibits filed May 22, 2007, Ex. L. The damages sought include the attorney's fees and costs the Plaintiffs incurred in defending against the Debtor's claims, damages for lost earnings, damages for injury to their reputations, social standing, and character, damages for emotional distress, and punitive damages.

¶42. In the Motion, the Plaintiffs seek "an order determining that any debt resulting from the malicious prosecution litigation" is nondischargeable. Motion at 9. No such relief was prayed for in Plaintiffs' complaint; indeed, the malicious prosecution action was not even mentioned. For this reason, the court will deny the Plaintiffs' request for an order determining that any debt resulting from that action is nondischargeable.

III. Conclusion

¶43. For the foregoing reasons, the court concludes that the findings of the state court supporting the attorney's fee award are entitled to preclusive effect in this proceeding, that such findings support a conclusion that attorney's fee award is nondischargeable under 11 U.S.C. § 523 (a) (6), and that as a result, there is no genuine issue of material fact remaining to be decided at trial.

¶44. For the reasons set forth above, the court will issue an order granting the Motion as to the attor-

ney's fee award and denying the motion as to any other debts that may arise out of the malicious prosecution action.

Dated: August 24, 2007

/s/ Robert Bardwil
ROBERT S. BARDWIL
United States Bankruptcy Judge

(EOR at pp. 42 to 54).

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

No. 97 AS 00985

CLAYEO C. ARNOLD and CLAYEO C. ARNOLD, a Professional Law Corporation,

Plaintiff,

vs.

MELANIE S. RIEGER and DOES 1 through 10,

Defendants.

Date filed: May 22, 1997

Attorneys for Plaintiff:
SHERIDAN, CARROLL & FINNERTY, LLP
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First Amended Complaint for
Damages and Injunctive Relief for:
1. Breach of Implied Contract;
2. Breach of Covenant of Good Faith and Fair Dealing;
3. Misappropriation of Trade Secrets;
4. Unfair Competition;
5. Trespass to Chattels;
6. Claim and Delivery;
7. Mandatory and Prohibitive Injunction;
8. Declaratory relief; and
9. Intentional Infliction of Serious Emotional Distress.

Plaintiffs, Clayeo C. Arnold (hereinafter " Arnold") and Clayeo C. Arnold, a Professional Corporation (hereinafter "the Law Firm") allege as follows:

Facts Common to All Causes of Action

1. The law firm is a professional law corporation with its principle place of business located in Sacramento County, California.
2. At all times mentioned herein, Clayeo C. Arnold is, and was, the controlling shareholder, and an employee, of the Law Firm.
3. Defendant Melanie Rieger (hereinafter "Rieger is an individual who was, until February 4, 1977, an employee of the Law Firm, working in Sacramento County, California.
4. At all times mentioned herein, Susan Artenstein (hereinafter "Artenstei n") is, and was, the Law

Firm's Office Manager.

5. Prior to September 26, 1966, Christine Spivey (hereinafter "Spivey") was an employee of the Law Firm.

6. At all times mentioned herein, David Flemmer (hereinafter "Flemmer") is, and was a partner in the computer consulting firm Accounting Software Technologies.

7. Arnold and the Law Firm are ignorant of the true names and capacities of the Defendants sued herein as Does 1 through 10, inclusive, and each of them, and therefore sue these Defendants by such fictitious names. Arnold and the Law Firm will seek leave of Court to amend this First Amended Complaint to allege their true names and capacities when ascertained. Arnold and the Law Firm are informed and believe and thereon allege that each of said fictitiously named Defendants is responsible in some manner for occurrences and events herein alleged and that damages as herein alleged were proximately caused by such acts and events.

8. At all times herein mentioned, each of the Defendants was the agent, servant, employee and/or employer of each other, and in doing acts hereinafter alleged Defendant actors were doing so within the scope of their authority as such agent, servant and employee and with the permission and consent of each other.

9. Rieger became employed with the Law Firm in or about December 1993 as a legal secretary. From approximately April 1995 through and including February 4, 1997, Rieger was employed by the Law Firm as a law Clerk. Rieger has attended Lincoln Law

School in Sacramento and anticipates sitting for the California State Bar Examination in July 1997.

10. On or before September 16, 1996, Spivey made allegations of sex discrimination against Arnold and the Law Firm.

11. Rieger knew of the existence of Spivey's allegations prior to the end of September, 1996.

12. In or about November 1996, the Law Firm announced a policy whereby no employee was permitted to maintain personal files on the Law Firm Computer system.

13. On December 23, 1996, Rieger made her own false allegation of sex discrimination against Arnold in a memorandum to Artenstein.

14. Artenstein immediately reported the allegation to Arnold.

15. Arnold verbally reprimanded Rieger for making a false allegation of sex discrimination.

16. On or about January 13, 1997, Spivey, Arnold, and the Law Firm entered into an Agreement resolving a dispute related to allegations of sex discrimination made by Spivey against Arnold and the Law Firm.

17. Rieger knew of the existence of the Agreement between Spivey, Arnold and the Law Firm prior to the end of January, 1997.

18. On January 31, 1996, the Law Firm announced that due to financial hardship, one employee would be laid off and, effective February 1, 1997, all remaining employees would be required to accept a ten percent reduction in their compensation.

19. Despite the false allegations of sex discrimination Rieger made against Arnold, she remained a trusted and valued Law Firm employee and, as such,

knew about and was entrusted with, many confidential aspects of the Law Firm law practice.

20. The Law Firm network computer system contained, at all times relevant herein, confidential client information and confidential and proprietary information regrading the internal processes used by the Law Firm in its practice and developed over the course of the Law Firm's existence.

21. The information contained in the Law Firm's computer systems was not and is not made available to competitors.

22. On February 4, 1997, Rieger voluntarily resigned here employment with the Law Firm but worked until the close of business on that day.

23. On or about February 5, 1997, the Law Firm discovered that Rieger had deleted over ninety files from its network computer system.

24. On or about February 6, 1997, the Lw Firm was notified that Rieger had also retained copies of the Law Firm's files for her own use.

25. On or about February 7, 1997, Artenstein with the assistance of Flemmer, retrieved some of the deleted files.

26. Rieger has refused to sign a Nondisclosure Agreement that would include terms requiring the immediate return of the Law Firm's files.

27. On the morning of February 20, 1997, Rieger contacted Artenstein and informed her that she intended to use the files as forms in her own future law practice and that she would never sign a confidentiality and/or non-disclosure agreement.

28. The Law Firm is informed and believes that Rieger continues to possess and use stolen Law Firm

files that are confidential and proprietary in nature.

First Cause of Action
(Breach of Contract)

29. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 28 of this First Amended Complaint.

30. During the period of Rieger's employment with the Law Firm there existed an implied contract whereby Rieger was obligated to protect all proprietary and confidential information, to refrain from engaging in conduct detrimental to or in competition with the Law Firm's law Practice, and act in good faith at all times in dealing with matters relating to her employment.

31. Rieger breached the employment contract by levelling an allegation of sex discrimination against Arnold that was false. Rieger had no subjective or good faith belief in the truth of the allegation and intended it to gain her an unfair an unearned advantage in the terms, conditions and benefits of her employment with the Law Firm.

32. Rieger breached the employment contract by copying, deleting and retaining the proprietary and confidential Law Firm filed without authorization.

33. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

34. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Second Cause of Action
(Breach of Covenant of Good Faith and Fair Dealing).

35. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 34 of this First Amended Complaint.

36. Arising out of Rieger' s employment relationship with the Law Firm, there existed an implied covenant of good faith and fair dealing by which Rieger promised to vie full cooperation to the Law Firm and to refrain from any act that would prevent, impede, or hinder the Law Firm from deriving the full benefit of all conditions of the employment relationship.

37. By copying, deleting and retaining the proprietary and confidential Law Firm files without authorization, Rieger prevented the Law Firm from deriving the full benefit of the employment relationship between Rieger and the Law Firm.

38. By levelling a false allegation of sex discrimination against Arnold, Rieger prevented the Law Firm from deriving the full benefit of the employment relationship between Rieger and the Law Firm.

39. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

40. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Third Cause of Action
(Misappropriation of Trade Secrets)

41. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 40 of this First Amended Complaint.
42. Rieger has been unjustly enriched from the unauthorized copying and retention of the proprietary and confidential Law Firm files.
43. In the event that Rieger should disclose or transfer the proprietary and confidential Law Firm files, this would constitute a further misappropriation of the Law Firm's trade secrets, in violation of the applicable statutes protecting trade secrets.
44. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.
45. As a direct and proximate result of Rieger's conduct, the Law Firm has incurred attorneys' fees and costs in an amount to be established at trial and in excess of the jurisdictional limits of this Court.
46. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Fourth Cause of Action
(Unfair Competition)

47. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 46 of this First Amended Complaint.

48. As an employee, Rieger had a fiduciary duty to the Law Firm and its clients to protect confidential and proprietary Law Firm files and to use them only in ways authorized by the Law Firm.

49. By copying, deleting and retaining the proprietary and confidential Law Firm files without authorization, Rieger has breached here fiduciary duty to both the Law Firm and its clients.

50. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

51. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

52. As a direct and proximate result of Rieger's conduct, the Law Firm has incurred attorneys' fees and costs in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Fifth Cause of Action
(Trespass to Chattels)

53. The Law Firm claims as against Rieger as

follows and realleges paragraphs 1 through 52 of this First Amended Complaint.

54. Rieger has intentionally interfered with the Law Firm's right to sole possession of the files.

55. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

56. As a direct and proximate result of Rieger's conduct, the Law Firm has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Sixth Cause of Action
(Claim and Delivery)

57. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 56 of this First Amended Complaint.

58. Rieger copied and retained for her own use the proprietary and confidential Law Firm files without authorization.

59. The Law Firm is entitled to immediate and exclusive ownership of the proprietary and confidential Law Firm files, which are now in the wrongful possession of Rieger.

60. Plaintiff is entitled to immediate possession of the stolen files.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Seventh Cause of Action
(Mandatory and Prohibitive Injunction)

61. The Law Firm claims as against Rieger as follows and realleges paragraphs 1 through 60 of this First Amended Complaint.
62. The Law Firm is informed and believes and on that basis alleges that Rieger will use, transfer, or otherwise disclose the proprietary and confidential Law Firm files without authorization and unlawfully.
63. Rieger has failed and continues to fail to return the proprietary and confidential Law Firm files to the Law Firm.
64. The Law Firm will be seriously harmed by the further use, transfer, or disclosure of the proprietary and confidential Law Firm files.
65. The actions of Rieger are willful, wanton, and malicious and were done with the intent to deprive the Law Firm of its property.

WHEREFORE, the Law Firm prays for judgment against Rieger as more fully set forth below.

Eighth Cause of Action
(Declaratory Relief)

66. Arnold and the Law Firm claim as against Rieger as follows and reallege paragraphs 1 through 65 of this First Amended Complaint.
67. An actual controversy has arisen and now exists between and among Arnold, the Law Firm and Rieger concerning their respective rights and duties concerning the Law Firm files. Arnold and the Law Firm content that they are entitled to the immediate return

of all such files. Whereas, Rieger contends that she is not required to return such files, and is, to the contrary, entitled to retain them for her own use.

68. Arnold and the Law Firm desire a judicial determination of their rights and duties, and a determination as to whom the files belong.

69. A judicial determination is necessary and appropriate at this time, and under these circumstances, in order that Arnold and the Law Firm may ascertain their rights and duties respecting the Law Firm files. Arnold is burdened emotionally and financially, and the Law Firm is burdened financially bu the unsettled and contentions nature of present dealings between the parties.

WHEREFORE, Arnold and the Law Firm pray for judgment against Rieger as more fully set forth below.

Ninth Cause of Action
(Intentional Infliction of Emotional Distress)

70. Arnold claims as against Rieger as follows and realleges paragraphs 1 through 69 of this First Amended Complaint.

71. Rieger knew, when she made the false allegation of sex discrimination against Arnold, that Arnold was particularly emotionally vulnerable to such an allegation.

72. In making the false allegation of sex discrimination against Arnold, Rieger intended to cause Arnold serious emotional distress.

73. In deleting and stealing the Law Firm's files, Rieger intended to cause Arnold serious emotional

distress.

74. In contacting and informing the Law Firm that she intended to use the Law Firm's files and would never sign a non-disclosure agreement, Rieger intended to cause Arnold serious emotional distress.

75. Rieger's conduct has caused Arnold severe emotional distress including depression, sleeplessness and anxiety.

76. As a direct and proximate result of Rieger's conduct, Arnold has suffered special damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

77. As a direct and proximate result of Rieger's conduct, Arnold has suffered general damages in an amount to be established at trial and in excess of the jurisdictional limits of this Court.

WHEREFORE, Arnold prays for judgment against Rieger as more fully set forth below.

Prayer

WHEREFORE, the Law Firm prays for relief as follows:

As to the First Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For costs of suit incurred herein; and
4. For such other and further relief as the Court deems just and proper.

As to the Second Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For costs of suit incurred herein; and
4. For such other and further relief as the Court deems just and proper.

As to the Third Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For reasonable attorneys' fees according to proof;
4. For exemplary and punitive damages according to proof;
5. For costs of suit incurred herein; and
6. For such other and further relief as the Court deems just and proper.

As to the Fourth Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For reasonable attorneys' fees according to proof;
4. For exemplary and punitive damages according to proof;
5. For costs of suit incurred herein; and
6. For such other and further relief as the Court deems just and proper.

As to the Fifth Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For exemplary and punitive damages according to proof;
4. For costs of suit incurred herein; and
5. For such other and further relief as the Court deems just and proper.

As to the Sixth Cause of Action:

1. For an Order of this Court directing that Rieger return the Law Firm Files to the Law Firm;
2. For costs of suit incurred herein; and
3. For such other and further relief as the Court deems just and proper.

As to the Seventh Cause of Action:

1. For an Order of this Court directing that Rieger return the Law Firm files to the Law Firm and requiring Rieger to execute a confidentiality agreement with respect to the files;
2. For costs of suit incurred herein; and
3. For such other and further relief as the Court deems just and proper.

WHEREFORE, Arnold and the Law Firm pray for relief as follows:

As to the Eighth Cause of Action:

1. For a declaration that the Law Firm is entitled to the immediate return of the Law Firm's files;
2. For an order of this Court requiring that Rieger execute a confidentiality agreement with the Law Firm; and
3. For such other and further relief as the Court deems just and proper.

WHEREFORE, Arnold prays for relief as follows:

As to the Ninth Cause of Action:

1. For special damages according to proof;
2. For general damages according to proof;
3. For costs of suit incurred herein;
4. For exemplary and punitive damages according to proof; and
5. For such other and further relief as the Court deems just and proper.

Dated: May 22, 1997

SHERIDAN, CARROLL & FINNERTY, LLP

By: /s/ Marc A. Le Forestire
Marc A. Le Forestire
Attorneys for Clayeo C. Arnold, a Professional Law Corporation

(EOR at pp. 55 to 71)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 97 AS 03390

MELANIE RIEGER,

Plaintiff,

vs.

CLAYEO C. ARNOLD, A PROFESSIONAL LAW CORPORATION; CLAYEO C. ARNOLD; SUSAN M. ARTENSTEIN; and DOES 1 through 10, inclusive,

Defendants.

Date filed: June 20, 1997

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COMPLAINT FOR DAMAGES
1. EMPLOYMENT DISCRIMINATION;
2. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY;
3. BREACH OF CONTRACT;
4. BREACH OF WRITTEN CONTRACT;
5. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING;
6. NEGLIGENT SUPERVISION;
7. DEFAMATION;
8. ASSAULT; and
9. BATTERY

COMES NOW plaintiff, MELANIE RIEGER, and complains and alleges against defendants, and each of them as follows:

FACTS AND ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. Plaintiff MELANIE RIEGER is, and all times relevant herein was an individual with her residence within the County of Sacramento, State of California.
2. Plaintiff is informed and believes, and upon such information and belief alleges, that defendant CLAY-EO C. ARNOLD, A Professional Law Corporation (hereinafter referred to as "CCA") is, and at all times relevant herein was a professional law corporation duly organized and existing under and by virtue of the laws of the State of California, with its principle place of business located within the County of Sacramento, State of California. Plaintiff is further informed and believes, and upon such information and belief alleges,

that said defendant employs more than five employees within the meaning of California Government Code, Section 12940, et seq.

3. Plaintiff is informed and believes, and upon such information and belief alleges, that defendant CLAYEO C. ARNOLD (hereinafter referred to as "ARNOLD") is, and at all times relevant herein was an attorney duly licensed to practice law in the State of California, as is, and was, the controlling shareholder of defendant CCA. Plaintiff is further informed and believes, and upon such information and belief alleges, that defendant CLAYEO C. ARNOLD is, and at all times relevant herein was a resident of the County of Sacramento, State of California, and is, and was, an employee and/or agent of defendant CCA.

4. Plaintiff is informed and believes, and upon such information and belief alleges, that defendant SUSAN M. ARTENSTEIN (hereinafter referred to as "ARTENSTEIN.") is, and at all times relevant herein was an individual and resident of the County of Sacramento, State of California, and is, and was, an employee and/or agent of defendant CCA.

5. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1 through 10, inclusive, and therefore sues said defendants by such fictitious names. Plaintiff will seek leave of this court to amend this Complaint to allege their true names and capacities when the same have been ascertained. Plaintiff is informed and believes, and upon such information and belief alleges, that each of said fictitiously named defendants is responsible in some manner for the occurrences and events herein alleged and that damages as herein alleged were

proximately caused, either in whole or in part, by such acts and events.

6. Plaintiff is informed and believes, and upon such information and belief alleges, that at all times relevant herein each of the defendants named herein was the agent, servant and employee, co-venturer and co-conspirator of each of the remaining defendants, and was at all times relevant herein, acting within the scope of such agency, employment, joint venture, and conspiracy.

7. Plaintiff is informed and believes, and upon such information and belief alleges, that at all times relevant herein, the acts of defendants as alleged herein were performed with the knowledge of an employer's economic power over its employees.

8. Whenever in this Complaint reference is made to "defendants , and each of them," such allegation shall be deemed to mean the acts of defendants acting individually, jointly, and/or severally.

9. On or about June 1993, plaintiff became employed by defendant CCA as a legal secretary. Thereafter, and on or about April 1995 through and including February 4, 1997 plaintiff was employed by defendant CCA as a law clerk.

10. During the period of plaintiff's employment with defendant CCA, defendant ARNOLD continually made sexual comments and innuendoes, made reference to sexual acts, and made demeaning and degrading remarks to plaintiff. Plaintiff informed said defendant that such behavior was neither appreciated nor appropriate. Despite sch statements by plaintiff, said defendant failed to cease such behavior.

11. During the period of plaintiff's employment

with defendant CCA, defendant ARTENSTEIN continually made sexual comments and innuendoes, made reference to sexual acts, and made demeaning and degrading remarks to plaintiff. Plaintiff informed said defendant that such behavior was neither appreciated nor appropriate. Despite such statements by plaintiff, said defendant failed to cease such behavior.

12. On or about December 11, 1996, defendant ARNOLD, in his capacity as employer and supervisor of plaintiff, came into plaintiff's office at her place of employment during business hours, and asked plaintiff to speak with a salesperson over the telephone to assist defendant in the purchase of an article of clothing for defendant's wife. While plaintiff was attempting to assist said salesperson as requested by defendant, defendant ARNOLD placed his hands on plaintiff's body, cupped plaintiff's breasts, slid his hands down her sides and grabbed her buttocks.

13. On or about December 27, 1996, defendant ARNOLD, in his capacity as employer and supervisor of plaintiff, called plaintiff into the conference room at plaintiff's place of employment during business hours, and proceeded to yell at plaintiff, using profanity and other inappropriate and threatening language. Said defendant then removed his glasses from his person and threw them at plaintiff in an act of rage and violence. Thereafter, defendant ARNOLD, after plaintiff managed to leave the conference room, followed plaintiff into her office and continued to yell at plaintiff, using profanity and other inappropriate and threatening language in an apparent act of rage and violence.

FIRST CAUSE OF ACTION
(For Discrimination In Employment As Against All Defendants)

14. Plaintiff repeats and realleges by reference each and every allegation contained in paragraphs 1 through 13 and incorporates the same herein as though fully set forth.

15. Defendant CCA, by and through its agents or supervisors, including defendants ARNOLD and ARTENSTEIN, and each of the defendants engaged in a pattern and practice of unlawful sex discrimination by subjecting plaintiff to unwelcome sexual harassment, in violation of the laws of the State of California, including, but not limited to Government Code Section 12940, et seq.

16. The above-described unwelcome sexual harassment created and intimidating, oppressive, hostile and offensive work environment which interfered with plaintiff's emotional well-being and ability to perform plaintiff's job duties.

17. Defendant CCA at all times relevant hereto had actual and constructive knowledge of the conduct described in paragraphs 10 through 13.

18. As a result of the hostile and offensive work environment perpetrated by defendants and maintained by defendant CCA, and defendant CCA's failure to protect plaintiff from further harassment, plaintiff suffered emotional distress.

19. Defendants CCA and ARNOLD violated the above-referenced laws by failing to adequately investigate, supervise, control, discipline, and/or otherwise penalize the conduct, acts, and failures to act of defen-

dants ARNOLD and ARTENSTEIN as described in paragraphs 10 through 13.

20. Defendants CCA and ARNOLD failed to comply with their duty to take all reasonable and necessary steps to eliminate sexual harassment from the work-place and to prevent it from occurring in the future.

21. Plaintiff is informed and believes, and based thereon alleges, that in addition to the practices enumerated above, defendants, and each of them, have engaged in other discriminatory practices against her which and not yet fully known. At such time as said discriminatory practices become known to her, plaintiff will seek leave of Court to amend this Complaint in that regard.

22. Plaintiff has filed charges of sex discrimination with the California Department of Fair Employment and Housing (hereinafter called "DFEH") against defendants CCA, ARNOLD, and ARTENSTEIN. True and correct copies of said charges are attached hereto as Exhibits "A", "B" and "C", respectively, and are incorporated herein by such references. Within one year of the filing of this Complaint, DFEH has issued Right-to-Sue Notices authorizing this lawsuit. True and correct copies of the Notices are attached hereto as Exhibit "D", and are incorporated herein by such reference. Plaintiff has exhausted her administrative remedies. [1]

23. As a direct and proximate result of defendants' willful, knowing and intentional discrimination against

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[1] The Exhibits referenced in the Complaint are not included in this appendix but were lodged in the EOR at pages 72 through 81

her, plaintiff has suffered pain and suffering, and mental anguish and emotional distress; she has incurred medical expenses for treatment by health care professionals, and for other incidental expenses; and she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proved at trial.

24. Plaintiff is informed and believes, and based thereon alleges, that the outrageous conduct of defendants described above was done with fraud, oppression and malice; with a conscious disregard for her rights; and with the intent, design and purpose of injuring her. Plaintiff is further informed and believes that the defendant CCA, through its officers, managing agents and/or its supervisors, and with full knowledge thereof, authorized condoned and/or ratified the unlawful conduct of defendants ARNOLD and ARTENSTEIN. By reason thereof, plaintiff is entitled to punitive or exemplary damages from all defendants in a sum according to proof at trial.

SECOND CAUSE OF ACTION
(Wrongful Termination in Violation of Public Policy Against Defendant CCA)

25. Plaintiff repeats and realleges by reference each and every allegation contained in paragraphs 1 through 23 and incorporates the same herein as though fully set forth.

26. Plaintiff is informed and believes, and based thereon alleges, that she was terminated from her

employment solely as a consequence of reporting the sexual harassment to which she and other female employees had been subjected by defendant ARNOLD.

27. It is the public policy of the State of California that individuals shall not be discriminated against in their employment on the basis of their sex (by being sexually harassed), or based upon the fact that they have made a report of sexual harassment.

28. As a direct and proximate result of defendant CCA's termination of plaintiff in violation of public policy, plaintiff has suffered pain and suffering, and mental anguish and emotional distress. Plaintiff has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

29. Plaintiff is informed and believes, and based thereon alleges, that the outrageous conduct of defendants described above was done with malice, fraud, and oppression; with conscious disregard for her rights; and with intent, design and purpose of injuring plaintiff. defendant CCA, through its officers, managing agents and/or supervisors, and with full knowledge thereof, authorized, condoned and/or ratified the unlawful conduct of all of the other defendants named in this action. By reason thereof, plaintiff is entitled to punitive or exemplary damages from all defendants in a sum according to proof at trial.

THIRD CAUSE OF ACTION
(Breach of Contract Against Defendant CCA and Does 1-5)

30. Plaintiff repeats and realleges by reference each and every allegation contained in paragraphs 1 through 13 and incorporates the same herein as though fully set forth.

31. Plaintiff was employed by defendants under an oral contract of employment which was modified and re-enforced by certain policies, practices, assurances, and other express and implied statements of defendant. In said contract, it was implicitly agreed that plaintiff would not be impeded in her job duties, and that she would be terminated only for cause. Plaintiff entered into said contract, *inter alia*, to secure peace of mind and financial stability, and refrained from seeking employment elsewhere in reliance thereon.

32. At all times material hereto, plaintiff performed her obligations under her contract with defendant. Defendants breached their express and implied contractual commitments to plaintiff by continually harassing plaintiff, impeding her job duties and terminating her employment without cause.

33. At the time the parties entered into the contract, as alleged herein above, it was known and understood, and within the reasonable contemplation of the parties, that in the event of a breach, plaintiff would suffer present and future loss of earnings as a foreseeable and probable result thereof.

34. As a direct and proximate result of defendants' breach of the implied contract, plaintiff in fact has suffered loss of wages and benefits, the full extent and

nature of which are presently unknown to her. Plaintiff will therefore seek leave of Court to amend this Complaint at such time as these damages are fully ascertained.

FOURTH CAUSE OF ACTION
(For Breach of Written Contract As Against Defendants CCA And Does 1 to 5.)

35. Plaintiff repeats and realleges by reference each and every allegation contained within paragraphs 1 through 13, and incorporates the same herein as though fully set forth.

36. On or about June 20, 1996, plaintiff entered into a written contract with defendants whereby defendants agreed to pay plaintiff a specified salary equal to $37,200.00 per year. A true and correct copy of said contract is attached hereto as Exhibit "E" and is incorporated herein under such reference.

37. On or about January 31, 1997, defendants, and each of them, breached said written agreement by demanding that plaintiff take a 10% reduction in salary and, further, notifying plaintiff that if she did not accept such salary reduction she would in fact be terminated.

38. Plaintiff has performed all conditions of said contract except those matters as to which she was prevented and/or excused from performing thereunder.

39. On or about February 4, 1997, defendants, and each of them, further breached said contract by terminating plaintiff.

40. As a result of the foregoing breaches by defendants, and each of them, plaintiff has been damaged in

the sum of $3,100.00 per month from February 4, 1997, up to and including the present date, and will continue to suffer such damages.

FIFTH CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing Against Defendant CCA and Does 1 - 5)

41. Plaintiff repeats and realleges by reference each and every allegation contained in Paragraphs 1 through 13, paragraphs 31 through 34, and paragraphs 36 through 40, and incorporates the same herein as though fully set forth.

42. Plaintiff is informed and believes that within every contract there exists an implied covenant that each party will not do anything to deprive the other of the benefits conferred thereunder. The basic tenets of the covenant provided that plaintiff's employment would be secure as long as her performance was satisfactory, that plaintiff's work environment would be free from sexual harassment, that plaintiff would not be impeded in her performance or career expectations, that plaintiff would not be terminated without good cause, and that plaintiff would earn agreed upon wages and fringe benefits.

43. Plaintiff undertook and continued employment, and duly performed all of the conditions of the employment agreement to be performed by her until prevented from further performance by defendants. Plaintiff had, at all times, been ready, willing and able to perform all of the conditions of the agreement to be performed by her.

44. From the time she began reporting defendants

ARNOLD' s and ARTENSTEIN' s sexual harassment, and up to February 4, 1997, defendants breached the covenant of good faith and fair dealing by interfering with plaintiff in the performance of her job duties, discharging plaintiff without probable cause and, in bad faith, failing to take complaints seriously, failing to investigate plaintiff's complaints, failing to discipline the offenders, and failing to ensure that the harassment ceased.

45. Defendants further breached the covenant of good faith and fair dealing by retaliating against plaintiff for reporting the sexual harassment. Such retaliation includes, but is not limited to, the condemnation of plaintiff's work, threatened reduction of plaintiff's pay, and eventual termination.

46. Plaintiff performed all conditions precedent to defendants' performance of their obligations under the contract. Plaintiff's performance was at all times satisfactory.

47. The law imposed duties on defendants, in connection with the employment agreement, to act fairly and in good faith towards plaintiff. Defendants covenanted to give full cooperation to plaintiff in her performance under the employment agreement and to refrain from any act which would prevent or impede any of the conditions of the employment agreement from being performed, which would deny the employment agreement or which would prevent plaintiff from receiving the benefits of the employment agreement.

48. At the time the parties entered into the covenant, as alleged herein above, it was known and understood, and within the reasonable contemplation of the parties, that in the event of a breach, plaintiff

would suffer loss of earnings and economic damage. As a direct and proximate result of defendants' conduct, plaintiff has suffered loss of earning and economic damage in an amount according to proof but exceeding the jurisdictional minimum of the Court.

49. Plaintiff is informed and believes, and based thereon alleges, that the outrageous conduct of defendants described above was done with malice, fraud, and oppression; with conscious disregard for her rights; and with the intent, design and purpose of injuring plaintiff. Defendant CCA, through its officers, managing agents and/or supervisors, and with full knowledge thereof, authorized, condoned and/or ratified the unlawful conduct of all of the other defendants named in this action. By reason thereof, plaintiff is entitled to punitive or exemplary damages from all defendants in a sum according to proof at trial.

SIXTH CAUSE OF ACTION
(Negligent Supervision Against Defendants CCA, ARNOLD and Does 5 - 10)

50 Plaintiff repeats and realleges by reference each and every allegation contained in Paragraphs 1 through 13 and incorporates the same herein as though fully set forth.

51. Beginning on or before June 1993, and continuing thereafter, defendants knew, or reasonable should have known, that defendants ARNOLD and ARTENSTEIN were engaging in the unlawful behavior described herein above.

52. At all times material herein, defendants knew, or reasonably should have known, that the conduct,

acts, and failures to act of all other defendants and/or supervisors, agents and employees as described herein above violated plaintiff's rights.

53. At all times material herein, defendants, and each of them, knew, or reasonable should have known, that the incidents, conduct acts, and failures to act described herein above, would and did proximately result in emotional distress to plaintiff, including, but not limited to, loss of sleep, anxiety, tension, depression, and humiliation.

54. At al times material herein, defendants, and each of them, knew, or in the exercise of reasonable care should have known, that unless defendants, and each of them, intervened to protect plaintiff, and to adequately supervise, prohibit, control, regulate, discipline, and/or otherwise penalize the conduct, acts, and failures to act of all other defendants and/or supervisors, agents or employees as alleged herein above, said conduct, acts and failures to act would continue, thereby subjecting plaintiff to personal injury and emotional distress.

55. Defendants, and each of them, knew, or in the exercise of reasonable care should have known, that unless defendants, and each of them, intervened to protect plaintiff, and to adequately supervise, prohibit, control, regulate, discipline, and/or otherwise penalize the conduct, acts, and failures to act of the defendants and others as described herein, defendants' failure to so protect, supervise, and intervene would have the effect of encouraging, ratifying, condoning, exacerbating, increasing and worsening said conduct, acts and failures to act.

56. At all times material herein, defendants, and

each of them, had the power, ability, authority, and duty to so intervene, supervise, prohibit, control, regulate, discipline, and/or penalize the conduct of all other defendants and/or supervisors, agents or employees as described herein above.

57. Despite said knowledge, power, and duty, defendants and each of them, negligently failed to act so as to prevent, supervise, prohibit, control regulate, discipline, and/or penalize such conduct, acts and failures to act, or to otherwise protect plaintiff.

58. As a direct and proximate result of the failure of defendants to protect plaintiff, and to adequately supervise, prohibit, control, regulate, discipline, and/or otherwise penalize the conduct, acts, and failures to act of all other defendants and/or supervisors, agents or employees as alleged herein above, said conduct, acts, and failures to act were perceived by them as, and in fact had the effect of, ratifying , encouraging, condoning, exacerbating, increasing, and/or worsening said conduct, acts, and failures to act.

59. At all times material herein, the failure of defendants, and each of them, to protect plaintiff, and to adequately supervise, prohibit, control, regulate, discipline, and/or otherwise penalize the conduct, acts, and failures to act of all other defendants and/or supervisors, agents or employees, violated plaintiff's rights.

60. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer pain and suffering, has suffered mental anguish and emotional distress, has incurred medical expenses for treatment by health care professionals, and for other incidental expenses, and has suffered and will

continue to suffer a loss of earning and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

61. Defendants' conduct as described herein was malicious and oppressive, and done with a conscious disregard to plaintiff's rights. The acts of defendants were performed with the knowledge of en employer's economic power over its employees. Defendants, through their officers, managing agents and/or supervisors, authorized, condoned and ratified the unlawful conduct of all of the other defendants in this action. consequently, plaintiff is entitled to punitive damages from all defendants.

SEVENTH CAUSE OF ACTION
(Defamation Against Defendants CCA, ARNOLD and Does 5 - 10)

62. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 13 and incorporates the same by reference as though fully set forth herein.

63. Plaintiff is informed and believes, and based thereon alleges, that defendants and each of them, individually and through their officers, partners, agents and employees, acting within the course of their employment, caused to be published false and unprivileged communications tending to directly injure plaintiff and her business and professional reputations. Specifically, defendants, and each of them, made untrue statements to other persons in plaintiff's profession and in the County of Sacramento, that

plaintiff had been fired for poor performance, and that plaintiff was a liar, thief, and morally unfit.

64. Plaintiff is informed and believes, and based thereon alleges, that at the time defendants made these statements they knew or had reason to know that the statements were false. Plaintiff is additionally informed and believes, and based thereon alleges, that defendants had no legitimate business purpose for the above-mentioned communications, nor were they privileged.

65. Defendants committed these above-said acts deliberately and intentionally, in an effort to injure and defame plaintiffs's good name and professional reputation. As a direct and proximate result of defendant's defamation, plaintiff has suffered loss of earnings, injury to her personal and professional reputation, and emotional distress, all to her damage in an amount according to proof at trial.

66. Plaintiff is informed and believes, and based thereon alleges, that the conduct of defendants described above was done with fraud, oppression and malice; and was done, authorized and ratified by the highest levels of defendants, thereby entitling plaintiff to punitive or exemplary damages in an amount according to proof at trial, but exceeding the jurisdictional minimum of this court.

EIGHTH CAUSE OF ACTION
(Assault Against Defendants CCA, ARNOLD and Does 5 - 10)

67. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 13 and

incorporates the same by reference as though fully set forth herein.

68. On or about December 27, 1996, defendant ARNOLD, in his capacity as employer and supervisor of plaintiff, called plaintiff into the conference room at plaintiff's place of employment, and during business hours, and proceeded to yell at plaintiff, using profanity and other inappropriate and threatening language. Said defendant then removed his glasses from his person and threw them at plaintiff in an act of rage and violence. Thereafter, defendant ARNOLD, after plaintiff managed to leave the conference room, followed plaintiff into her office and continued to yell at plaintiff, using profanity and other inappropriate and threatening language in an apparent act of rage and violence.

69. In doing the acts as alleged above, defendant intended to cause or to place plaintiff in apprehension of a harmful and offensive contact with plaintiff's person.

70. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of a harmful and offensive contact with plaintiff's person.

71. At no time did plaintiff consent to any of the acts of defendant alleged above.

72. As a direct and proximate result of defendant's actions, plaintiff has suffered and will continue to suffer pain and suffering, has suffered mental anguish and emotional distress, has incurred medical expenses for treatment by health care professionals, and for other incidental expenses, and has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is

thereby entitled to general and compensatory damages in amounts to be proven at trial.

NINTH CAUSE OF ACTION
(Sexual Battery Against Defendants CCA, ARNOLD and does 5 - 10)

73. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 13 and incorporates the same by reference as though fully set forth herein.

74. On or about December 11, 1996 defendant ARNOLD, in his capacity as employer and supervisor of plaintiff, came into plaintiff's office at plaintiff's place of employment, and during business hours, and asked plaintiff to speak with a salesperson over the telephone to assist defendant in the purchase of an article of clothing for defendant's wife. While plaintiff was attempting to assist said salesperson as requested by defendant, defendant ARNOLD placed his hands on plaintiff's body, cupped plaintiff's breasts, slid his hands down her sides and grabbed her buttocks.

75. In doing the acts as alleged above, defendant intended to cause offensive contact with intimate parts of plaintiff's person, in violation of Civil Code § 1708.5.

76. As a result of defendant's acts as alleged above, such offensive contact with plaintiff's person did in fact occur.

77. At no time did plaintiff consent to any of the acts of defendant alleged above.

78. As a direct and proximate result of defendant's actions, plaintiff has suffered and will continue to

suffer pain and suffering, has suffered mental anguish and emotional distress, has incurred medical expenses for treatment by health care professional, and for other incidental expenses, and has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

79. Defendant's conduct as described herein was malicious and oppressive, and done with a conscious disregard of plaintiff's rights. The acts of defendant were performed with the knowledge of an employer's economic power over its employees. defendants, through their officers, managing agents and/or supervisors, authorized, condoned and ratified the unlawful conduct of all of the other defendants in this action. consequently, plaintiff is entitled to punitive damages form all defendants.

WHEREFORE, plaintiff prays that judgment be entered in her favor and against defendants as follows:

As to the First Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;
3. That plaintiff be awarded reasonable attorney's fees and costs of suit; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Second Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Third Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. For costs of suit incurred herein; and
3. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Fourth Cause of Action:

1. For damages according to proof at the rate of $3,100.00 per month from February 4, 1997;
2. For interest on such damages as afforded by law;
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Fifth Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;

3. For costs of suit herein; and
4. That plaintiff be awarded such other further relief as the Court deems just and proper.

As to the Sixth Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Seventh Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

As to the Eighth Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial;
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and fur-

ther relief as the Court deems just and proper.

As to the Ninth Cause of Action:

1. That plaintiff be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. That plaintiff be awarded punitive damages in an amount according to proof at trial; as afforded by Civil Code §1708.5(b);
3. For costs of suit incurred herein; and
4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

Dated: June 20, 1997

BRAYTON HARLEY CURTIS

By: /s/ Clayton W. Kent
Clayton W. Kent
Attorneys for Plaintiff

(EOR at pp. 82 to 89)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. 07 AS 03390 and 97 AS 00985

Department Number: 64

MELANIE RIEGER,

Plaintiff,

vs.

CLAYEO C. ARNOLD, ET AL.,

Defendant.

VERDICT

Upon plaintiff's claim for hostile environment harassment made by the first count of her complaint.

1. We find in favor of the plaintiff and against each defendant opposite whose name there is written the word "yes", and against the plaintiff and in favor of each defendant opposite whose name there is written the word "no" as follows:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law Corporation	___	X
Clayeo C. Arnold	___	X
Susan M. Artenstein	___	X

(If you have used the word " Yes" in your finding in paragraph 1, then proceed to paragraph 2; otherwise, ignore paragraph 2 and go directly to paragraph 5).

2. We assess plaintiff's compensatory damages against each defendant opposite whose name there is written the word "Yes" in paragraph 1 in the amount set forth opposite such defendant's name as follows:

Defendant	Amount
Clayeo C. Arnold, a professional Law Corporation	_____
Clayeo C. Arnold	_____
Susan M. Artenstein	_____

(If you have assessed plaintiff's compensatory damages in paragraph 2, then proceed to paragraphs 3 and 4; otherwise, ignore paragraphs 3 an 4 and go directly to paragraph 5).

3. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 1 amounted to oppression with respect to each defendant after whose name there is

written the word "Yes" in paragraph 1 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___
Susan M. Artenstein	___	___

4. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 1 was performed with malice with respect to each defendant after whose name there is written the word "Yes" in paragraph 1 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___
Susan M. Artenstein	___	___

Upon plaintiff's claim for failure to take steps to protect her from harassment, made by the first count of her complaint.

5. We find in favor of the plaintiff and against each defendant opposite whose name there is written the word "Yes", and against the plaintiff and in favor of each defendant opposite whose name there is written the word "No", as follows:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	X	___
Clayeo C. Arnold	___	X
Susan M. Artenstein	X	___

(If you have used the word "Yes" in your finding in paragraph 5, then proceed to paragraph 6; otherwise, ignore paragraph 6 and go directly to paragraph 9).

6. We assess plaintiff's compensatory damages against each defendant opposite whose name there is written the word "Yes" in paragraph 5 in the amount set forth opposite such defendant's name as follows:

Defendant	Amount
Clayeo C. Arnold, a professional Law Corporation	$15,000.00
Clayeo C. Arnold	_____
Susan M. Artenstein	0

(If you have assessed plaintiff's compensatory damages in paragraph 6, then proceed to paragraphs 7 and 8; otherwise, ignore paragraphs 7 and 8 and go directly to paragraph 9).

7. We find, by clear and convincing evidence, that the conduct upon which we base our finding of liability in paragraph 5 amounted to oppression with respect to each defendant after whose name there is

written the word "Yes" in paragraph 5 and below.

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	X
Clayeo C. Arnold	___	___
Susan M. Artenstein	___	X

8. We find, by clear and convincing evidence, that the conduct upon which we base our finding of liability in paragraph 5 was performed with malice with respect to each defendant after whose name there is written the word "Yes" in paragraph 5 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	X
Clayeo. C. Arnold	___	___
Susan M. Artenstein	___	X

Upon plaintiff's claim for wrongful termination in violation of public policy made by the second count of the complaint.

9. We find in favor of the plaintiff and against each defendant opposite whose name there is written the word "Yes", and against the plaintiff and in favor of each defendant opposite whose name there is written the word "No" as follows:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	X

(If you have used the word "Yes" in your finding in Paragraph 9, then proceed to paragraph 10; otherwise, ignore paragraph 10 and go directly to paragraph 13.)

10. We assess plaintiff's compensatory damages against each defendant opposite whose name there is written the word "Yes", in paragraph 9 in the amount set forth opposite such defendant's name as follows:

Defendant	Amount
Clayeo C. Arnold, a professional Law corporation	_____

(If you have assessed plaintiff's compensatory damages in paragraph 10, then proceed to paragraphs 11 and 12; otherwise, ignore paragraphs 11 and 12 and go directly to paragraph 13).

11. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 9 amounted to oppression with respect to each defendant after whose name there is written the word "Yes" in paragraph 9 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law Corporation	___	___

12. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 9 was performed with malice with respect to each defendant after whose name is written the word "Yes" in paragraph 9 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___

Upon plaintiff's claim for assault made by the eighth count of her complaint

13. We find in favor of the plaintiff and against each defendant opposite whose name there is written the word "Yes", and against the plaintiff and in favor of each defendant opposite whose name there is written the word "No":

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	X
Clayeo C. Arnold	___	X

(If you have used the word "Yes" in your finding in paragraph 13, then proceed to paragraph 14; other-

wise, ignore paragraph 14 and go directly to paragraph 17).

14. We assess plaintiff's compensatory damages against each defendant opposite whose name there is written the word "Yes" in paragraph 13 in the amount set forth opposite such defendant's name as follows:

Defendant	Amount
Clayeo C. Arnold, a professional Law corporation	_____
Clayeo C. Arnold	_____

(If you have assessed plaintiff's compensatory damages in paragraph 14, then proceed to paragraphs 15 and 16; otherwise, ignore paragraphs 15 and 16 and go directly to paragraph 17).

15. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 13 amounted to oppression with respect to each defendant opposite whose name there is written the word "Yes" in paragraph 13 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___

16. We find, by clear and convincing evidence,

that the conduct upon which we based our finding of liability in paragraph 13 was performed with malice with respect to each defendant opposite whose name there is written the word "Yes " in paragraph 13 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___

Upon plaintiff's claim for battery made by the ninth count of the complaint

17. We find for the plaintiff and against each defendant opposite whose name there is written the word "Yes", and against the plaintiff and in favor of each defendant opposite whose name there is written the word "No":

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___

(If you have used the word "Yes" in your finding in paragraph 17, then proceed to paragraph 18; otherwise, ignore paragraph 18 and go directly to paragraph 21).

18. We assess plaintiff's compensatory dam-

ages against each defendant opposite whose name there is written the word "Yes" in paragraph 17 in the amount set forth opposite such defendant's name as follows:

Defendant	Amount
Clayeo C. Arnold, a professional Law corporation	_____
Clayeo C. Arnold	_____

(If you have assessed plaintiff's compensatory damages in paragraph 18, then proceed to paragraphs 19 and 20; otherwise, ignore paragraphs 19 and 20 and go directly to paragraph 21)

19. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 17 amounted to oppression with respect to each defendant opposite whose name there is written the word "Yes" in paragraph 17 and below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___

20. We find, by clear and convincing evidence, that the conduct upon which we based our finding and liability in paragraph 17 was performed with malice with respect to each defendant opposite whose name there is written the word "Yes" in paragraph 17 and

below:

Defendant	Yes	No
Clayeo C. Arnold, a professional Law corporation	___	___
Clayeo C. Arnold	___	___

Upon the claim of defendant Clayeo C. Arnold, a professional law corporation, for interference with its computer data base:

21. We find in favor of the defendant and against the plaintiff opposite whose name there is written the word "Yes", and against the defendant and in favor of the plaintiff opposite whose name there is written the word "No":

Plaintiff	Yes	No
Melanie R. Rieger	X	___

(If you have used the word "Yes" in your finding in paragraph 21, then proceed to paragraph 22; otherwise, ignore paragraph 22 and have the verdict form dated and signed and return with it to the court room).

22. We assess defendant's compensatory damages against each plaintiff opposite whose name there is written the word "Yes" in paragraph 21 in the amount set forth opposite such plaintiff's name as follows:

Plaintiff	Amount
Melanie R. Rieger	$237.50

(If you have assessed defendant's compensatory damages in paragraph 22, then proceed to paragraphs 23 and 24; otherwise, ignore paragraphs 23 and 24; have this verdict form dated and signed and return with it to the courtroom).

23. We find, by clear and convincing evidence, that the conduct upon which we based finding of liability in paragraph 21 amounted to oppression with respect to each plaintiff opposite whose name there is written the word "Yes" in paragraph 21 and below:

Plaintiff	Yes	No
Melanie R. Rieger	___	X

24. We find, by clear and convincing evidence, that the conduct upon which we based our finding of liability in paragraph 21 was performed with malice with respect to each plaintiff opposite whose name there is written the word "Yes" in paragraph 21 and below:

Plaintiff	Yes	No
Melanie R. Rieger	___	X

Dated: 8/30/99 /s/ _____
Foreperson

(EOR at pp. 360, 361)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case Number: 97AS03390 and 97AS00985

Department Number: 64

MELANIE RIEGER,

Plaintiff,

vs.

CLAYEO ARNOLD, ET AL.,

Defendant.

ORDER FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Pursuant to Code of Civil Procedure section 629, it is ordered that the judgment entered herein provide that plaintiff recover nothing from defendants Clayeo C. Arnold, a professional law corporation and Susan M. Artenstein, notwithstanding the provisions of the jury's verdict finding in favor of the plaintiff and against those defendants upon plaintiff's claim for failure to take steps to protect her from harassment, made by the first count of the complaint.

DISCUSSION

The verdict contained findings against the plaintiff and in favor of all defendants upon plaintiff's claim for hostile environment harassment made by the first count of her complaint.

Since there exists no independent cause of action for failure to protect against hostile environment harassment, the findings favoring the plaintiff upon that claim cannot be supported and a judgment favoring the defendants, notwithstanding the verdict, is required. (Trujillo v. North County Transit District [1998] 63 Cal. App. 4th 280, 288-289)

Date: October 29, 1999

/s/ John J. Golden
Honorable JOHN J. GOLDEN,
Judge of the Superior Court of California,
County of Sacramento

(EOR at pp. 325 to 327)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case Number: 97AS03390 and 97AS00985

Department Number: 64

MELANIE RIEGER,

Plaintiff,

vs.

CLAYEO ARNOLD, ET AL.,

Defendants.

CLAYEO C. ARNOLD and CLAYEO C. ARNOLD, a Professional Law Corporation

Plaintiffs,

vs.

MELANIE RIEGER and Does 1 through 10, inclusive.

AMENDED JUDGMENT

Recitals

This amended judgment is entered for the purpose of correcting a clerical error which occurred in the drafting of the "Recitals" portion of the judgment entered herein October, 29, 1999.

The cases captioned above have been consolidated.

In case No. 97AS00985, there were entered orders (on 7-2-99 and 7-8-99) granting in part and denying in part a motion for "summary adjudication" brought by the defendant (Rieger) as to each claim asserted in plaintiff's (Clayeo C. Arnold and Clayeo C. Arnold, a professional law corporation) complaint. The effect of such orders was to adjudge each of said claims against the plaintiffs (Clayeo C. Arnold and Clayeo C. Arnold, a professional law corporation) and in favor of the defendant (Rieger), except for the claims asserted by the plaintiff Clayeo C. Arnold, a professional law corporation, in the "second allegation" of the first count and in the fifth count of said complaint. The case later went to jury trial on the claims asserted by the corporation in the "second allegation" of the first count and the fifth count of said complaint, and, on August 30, 1999, the jury returned a verdict by which it awarded the plaintiff, Clayeo C. Arnold, a professional law corporation, damages of $237.50 against defendant Rieger upon those claims (interference with the computer data base).

Meanwhile, on July 19, 1999, there had been entered a judgment favoring the defendant Rieger and against the plaintiff Clayeo C. Arnold in case No. 97AS00985.

The verdict of the jury, referred to hereinafter, awarded the plaintiff Clayeo C. Arnold, a professional law corporation, damages of $237.50 against defendant Rieger upon that claim (interference with the computer data base).

In case No. 97AS03390, the case went to jury trial and an order was made by minute order on August 24, 1999 and ratified by written order on October 29, 1999, that a judgment of nonsuit be entered as to each cause of action expressed in the third, fourth, and sixth counts of plaintiff's (Rieger's) complaint as to each defendant (Clayeo C. Arnold, a professional law corporation; Clayeo C. Arnold; Susan M. Artenstein).

On July 15, 1999, the claim made by the seventh count of the complaint was voluntarily dismissed by the plaintiff (Rieger).

The case proceeded to jury verdict on the claims made by the first, second, eighth and ninth counts of the complaint.

The verdict of the jury, referred to hereinafter, found in favor of the defendants and against the plaintiff (Rieger) on all claims made by the first, second, eighth and ninth counts of the complaint, except that it found in favor of the plaintiff (Rieger) and against two of the defendants (Clayeo C. Arnold, a professional law corporation and Susan M. Artenstein) on the claim made by the first count of that complaint alleging a failure to take steps to protect the plaintiff (Rieger) from harassment.

By an order herein October 29, 1999, it was ordered that judgment be entered favoring the defendants (Clayeo C. Arnold, a professional law corporation

and Susan M. Artenstein) upon that claim, notwithstanding the verdict of the jury.

A copy of the jury's verdict, returned August 30, 1999, is appended hereto.

Judgment

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

No Party shall recover anything from any other party except that Clayeo C. Arnold, a professional law corporation shall recover from Melanie Rieger the sum of $237.50, plus its costs of suit incurred herein in the sum of $_____ and attorney's fees of $_____; Clayeo C. Arnold shall recover from Melanie Rieger his costs of suit incurred herein in the sum of $_____ and attorney's fees of $_____; and Susan M. Artenstein shall recover from Melanie Rieger her costs of suit incurred herein in the sum of $_____.

Date: February 15, 2000

/s/ John J. Golden
Honorable JOHN J. GOLDEN,
Judge of the Superior Court of California,
County of Sacramento

(EOR at pp. 366 to 396)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

NO. 97AS03390

MELANIE REIGER, (sic)

Plaintiff

vs.

CLAYEO C. ARNOLD, a Professional Law Corporation, CLAYEO C. ARNOLD, AND SUSAN M. ARTENSTEIN and DOES 1 through 10, inclusive,

Defendants.

AND ASSOCIATED CROSS-ACTION

Date:	February 9, 2000
Time:	9:00 a.m.
Dept.	64
Entered:	October 29, 1999

Attorneys for Defendants and Cross-Plaintiffs Clayeo C. Arnold, a Professional Law Corporation, Clayeo C. Arnold, and Susan M. Artenstein

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Memorandum of Points and Authorities
in Support of Defendant's Joint Motion
for Attorneys Fees and Costs [1]

III. Argument

A. The Defendants are Entitled to Recover Their Attorney's Fees Under Government Code Section 12965 Because Reiger's Action was Frivolous

Under discretionary prevailing party statutes, such as the Fair Employment and Housing Act, [22] a

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[1] For purposes of this Petition, please note that the entire document is contained in the EOR at 366 to 396. The motion is reproduced here beginning with the Points and Authorities. The introduction is omitted herein.

[22] Government Code section 12965 reads, in relevant part, as follows: "In actions brought under this section, the court,

defendant who prevails is entitled to an award of attorneys fees and costs if it is demonstrated that the plaintiff's claim was frivolous, unreasonable, or without foundation. (See *Christinsburg Garment Co. V. EEOC* (1987) 434 U.S. 412 (establishing the rule with respect to federal civil rights statutes) ; *Bond v. Pulsar Video Products* (1996) 50 Cal.App.4th 918 (holding that a prevailing defendant is entitled to attorneys' fees when the plaintiff's discrimination claim is found to be "f rivolous, without foundation and brought in bad faith).)

Reiger's claim of sex discrimination in employment, based upon allegations of sexual harassment, was frivolous. This is established because the evidence uncovered during discovery, and presented at trial demonstrates that Reiger never had any hope of establishing material elements of her discrimination claim. An individual claiming discrimination under a hostile work environment theory, as Reiger did; due to unlawful sexual or gender-based harassment, must show that he or she was subjected to *unwelcome conduct* based on sex or gender, which was sufficiently severe and pervasive to alter the work environment, and did in fact create an abusive working environment. (See *Ellison v. Brady* (9th Cir. 1995) 924 F.2d 872.) In making such a showing, the employee must meet both an objective and a *subjective standard.* Objectively, the employee must show that a reasonable woman (or man) in the same situation would have considered the

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in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity."

conduct offensive, severe and pervasive. Subjectively, the employee must show that she (or he) *actually found the conduct offensive, severe and pervasive.* (*Harris v. Forklift Systems* (1993) 510 U.S. 17; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F. 3d 1522). Even assuming that Reiger could meet the objective test, she clearly could not meet the subjective test. Because Reiger was a major instigator in office sex play, her contention that she found such conduct unwelcome was meritless. [23]

In determining whether the conduct complained of is sufficiently severe and pervasive to create a hostile or offensive working environment, the courts look at the totality of the circumstances. In *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-10, the court explained this standard in the context of a sexual harassment claim as follows: The factors that can be considered in evaluating the totality of the circumstances are (1) the nature of the unwelcome sexual acts or words (generally physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total

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[23] To establish that Reiger's action was frivolous, it is enough to demonstrate that she clearly had no hope of overcoming a defense to the action. For example, in *Linsley v. 20th Century Fox* (1999) 75 Cal.App.4th 762, the plaintiff appealed from a judgment awarding attorney fees under Government Code section 12965 to a prevailing defendant. Although in *Linsley* the plaintiff may have been a victim of unlawful discrimination, he had signed a release of claims prior to filing the lawsuit. The existence of this defense rendered the action "unreasonable, frivolous, or meritless,: and the court of appeal affirmed. (*Linsley, supra* 75 Cal.App.4th at 764).

number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. In determining what constitutes "sufficie ntly pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial. Rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.

Again, Reiger's own conduct negates her claim under this element, which requires an evaluation of the "totality of circumstances." First Reiger welcomed sexual conduct in every imaginable context, and regularly initiated sexual misconduct in the workplace. Her testimony that she was innocent of any complicity in sexual misconduct was unsupported by other witnesses, and was refuted, and indeed ridiculed, by countless other witnesses. The conflict between Reiger's testimony in this area on the one hand, and virtually every other witness on the other, establishes that Rieger claim was bogus from the outset. Reiger never objected and never complained.

Furthermore, that Reiger's version of events was fictitious was established in discovery, and at trial, when Mr. Farwell, Ms. Sprick, Mr.Waltz, Mr. Stein, and Ms. Parham, all testified that Reiger welcomed sexual activity in one form or another. Each of these individuals is a third party to this litigation, with no reason to favor the Defendants' version of events. In additional, two of these third parties are attorneys, whose livelihood would be jeopardized by giving false testimony.

The circumstances in which an award of attorneys' fees is appropriate to a prevailing defen-

dant may be illustrated by comparing the facts of this action to those of *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383 (denying award of fees to prevailing defendant in FEHA action), and *Bond v. Pulsar Video* (1996) 50 Cal.App.4th 918 (awarding fees to prevailing defendant in FEHA action).). In *Cummings*, the court recognized that because the "language, purpose and intent" of both California and federal anti-discrimination statutes are identical, it should apply the standard used by federal courts in awarding fees to prevailing defendants. (*Cummins, supra,* 1386-87). It was articulated by the Court in *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412 as follows: such awards should be permitted 'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" (*Christianburg Garment, supra,* 434 U.S. at 421). However, under the *Christianburg* ruling, the use of term "vexatious" was not intended to require that a plaintiff exercised subjective bad faith in prosecuting the action as a prerequisite to an award of attorneys' fees for the prevailing defendant. (See *Cummings, supra*, 1386-87) *Christianburg, supra,* 434 U.S. at 421.) In *Cummings,* the court ruled that the action did not meet the "frivolous, meritless or vexatious" standard, because he presented evidence that supported his claim, some of which was obtained during the discovery process. The court ruled that rather than being frivolous, the action was merely a routine one in which the plaintiff simply was not successful. (*Cummings, supra,* 1390.) This action does not present the Court with circumstances analogous to *Cummings.* Here, the only

evidence presented by Reiger, was her own testimony, which was refuted by more than a dozen other witnesses. In discovery, Reiger and her attorneys uncovered no evidence that supported her claims.

In contrast, in *Bond v. Pulsar Video* (3rd D.C.A. 1996) 50 Cal.App.4th 918, the Third Appellate District Court of Appeal affirmed an award of fees to the prevailing defendant in a race discrimination action brought under FEHA. The court also applied the standard articulated in *Christianburg,* and distinguished *Cummings.* (*Bond, supra*, 50 Cal.App.4th at 921-924.) The court first rejected the plaintiff's argument that his having survived a motion for summary judgment established that the action was not frivolous: "Declarations sufficient to create a triable issue in a summary judgment proceeding may, in the crucible of a trial, be revealed to be spurious and the litigant's claim frivolous, unreasonable and without foundation." (*Bond, supra,* 50 Cal.App.4th at 923). Although there was no transcript of the proceedings in the appellate record the *Bond* court relied upon the trial court's explanation of its ruling from the motion hearing. The trial court's reasoning is instructive here:

> I think the evidence was clear that there wasn't anything discriminatory by Mr. Bailey [Pulsar's owner]. He was--he was dragged through several days of trial, I think, and attorney's fees needlessly. [P]eople shouldn't have to do that. There was no evidence at all that your client - -there was no evidence at all even that he should have believed he was

> being discriminated against. There is just nothing at all. I sat here and listened and the fact that I made my rulings at the close of your case, and I don't even recall when I had a motion for directed verdict, I was so sure of what the jury was going to do after the lack of evidence on those causes of action. I wanted the defendant- -I mean, the plaintiff to hear it from the jury myself [sic]. I was quite surprised that it took a day-and-a-half, but I wasn't surprised by the fact that it was twelve/zero, I have to tell you, and it is through no fault of your own. There was no- -just no evidence. There was just no evidence there, and Mr. Bailey has been put through I think needless trial expenses over commissions which he offered three times that amount to settle by his 998 offer; and to go through that many days of jury trial and put him through that expense and all discovery and depositions and everything else for a seventeen hundred dollar commission judgment that he offered to pay I think is totally unfair.

(*Bond, supra,* 50 Cal.App.4th at .)(sic - missing page number) The court upheld the attorneys' fees award. The *Bond* decision is applicable here. In essence, Reiger presented nothing more at trial than what she could have presented by declaration on the material elements of her discrimination cause of action.

The Court should not feel unease about award-

ing fees to the defendants here. Such an award is supported by public policy. In *Del Rio v. Jetton* (1997) 55 Cal.App.4th 30 (holding that malicious prosecution actions are not preempted by federal rights statutes), the Court assessed the public policy underlying the fee shifting provisions of Title VII of the Civil Rights Act of 1964. The court's reasoning is worth quoting at length.

> The Senate Report expressed an awareness of the tension between the potential chilling effect on plaintiffs from allowing an award of attorney's fees to a prevailing defendant, and the right of a defendant to recover fees when an action is brought frivolously. According to the report, parties seeking to enforce civil rights as 'private attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose . . . .What emerges is a dual purpose for the attorney's fee provision of section 1988: (1) to encourage vigorous enforcement of good faith civil rights claims, and (2) to deter the bringing of civil rights actions which are "clearly frivolous, vexatious, or brought for harassment purposes." (Sen.Rep. No. 94-1011, 2d Sess., pp. 4-5 (1976).) The importance of this second, deterrent purpose was explained in *Hamilton v. Daley* (7th Cir. 1985) 777 F.2d 1207,

> 1211: "[A] statute awarding fees only to prevailing plaintiffs, and not to prevailing defendants, while certainly within Congressional power, would provide incentives to bring suit without penalizing litigants who bring suits solely for harassment with no hope for success. [Citation.] Meritless lawsuits clog court dockets, delaying the resolution of meritorious suits and diverting judicial resources that could be devoted to worthwhile litigation. Courts exist to settle disputes, not to settle scores. Suits filed with no real hope of victory needlessly bring defendants through the costly and agonizing uncertainty of defending suit . . . . Congress recognized these dangers in providing fees not just to prevailing plaintiffs but to prevailing parties.

(*Del Rio v. Jetton, supra,* 55 Cal.App.4th at 34-34.) Accordingly, Defendant's must be awarded their fees as the prevailing parties in this action in order to mitigate the harm of being forced to litigate a frivolous action, and to uphold the public policy that supports the fee shifting provisions of Government Code section 12965.

B. Defendant's Lodestar Amount is Reasonable.

The California Supreme Court has established that a trial court must begin its analysis of the amount of attorneys' fees to award by determining the "lodestar" or "t ouchstone" figure, which is the product of the number of hours reasonably expended by the

attorneys and the reasonable hourly rate for each attorney. (See *Serrano v. Priest* (1977) 20Cal.3d 25, 48-49 (*"Serrano I"*), *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 932-48; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 626-39 (*"Serrano II"*).) The Loadstar figure may also properly include out-of-pocket expense of the type normally billed by an attorney to a fee paying client, in addition to the time spent on the fee application itself. (See *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407; and *Serrano II, supra,* 32 Cal.3d at 632-38).

Defendants are entitled to be compensated for "all hours reasonably spent" on this matter. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 763 (*Serrano IV*"), *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273, 74). The time claimed by Defendants' attorneys here is based upon detailed time records that were maintained as the work was performed, and compiled into monthly billing statements. (Poidmore Declaration, ¶¶ 8-11; Sheridan Declaration ¶¶ 9-12; Mitchell Declaration, ¶¶ 3-6). Where, as here, there is sworn testimony that, in fact, it took the time claimed, is evidence of considerable weight on the issue of the time required." (*Perkins v. Mobile Housing Board* (11th Cir.1988) 847 F.2d 735, 738). Therefore, to deny compensation, "it must appear that the time claimed is obviously and convincingly excessive under the circumstances." (*Id.*) Having submitted detailed billing statements of all time expended on this action, Defendants' claims for attorneys' fees are entitled to great deference.

In addition, Defendants' counsel are entitled to be compensated at rates that reflect the reasonable

market value of their services in the community. (*Serrano II, supra,* 32 Cal.3d at 643). In each instance here, Defendants' counsels' rates are substantially below the Sacramento market rate for attorneys of comparable skill and experience. (See Poidmore Dec., ¶ 8; Sheridan Dec., ¶ 9; Mitchell Dec., ¶ 3.)

Where, as here, the statute authorizing an award of attorneys' fees also authorizes an award of costs, out-of-pocket expenses of the type that are normally billed to a fee paying client, such as expert witness fees, photocopying, travel costs, courier fees, and the like, may be awarded, in the Court's discretion, if they are ordinarily incurred and billed to the client. (*Beasley, supra,* 235 Cal.App.3d at 1419-22; *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1166-67; *Downey Cares v. Downey Comm. Dev't Commn.* (1987) 196 Cal.App.3d 983, 994).)

C. The Corporation Is Entitled To Recover The Expenses of Proving Matters at Trial Which Reiger Denied In Responses to Request for Admissions.

The Code of Civil Procedure allows a party who proves matters at trial that were denied in response to requests for admissions propounded during the discovery process, to move for the costs incurred in proving the non-admitted matters, including reasonable attorneys' fees. The award of these costs is mandatory, unless the court "finds that (1) an objection to the request was sustained or a response to it was waives . . . , (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had a reasonable ground to believe that that party

would prevail on the matter, or (4) there was other good reason for the failure to admit." (Code Civ. Proc. § 2033(o).)

In *Garcia v .Hyster Company* (1994) 28 Cal.App. 4th 724, the court approved the trial court's award of attorney's fees under Code of Civil Procedure section 2033(o), but remanded for further consideration on the amount of fees to be awarded. The Trial court had relied upon a conclusory statement of counsel regarding the amount of fees at issue, which did not include the attorney's hourly rate or an accounting of hours spent. Furthermore, the fees clearly included work unrelated to proof of matters related to the requests for admissions. (*Garcia, supra* 28 Cal.App.4th at 737.)

The fee-shifting provision of Section 2033(o) is an important enforcement tool to ensure that litigants obey the mandate of the discovery process and have due regard for considerations of judicial economy. Here, Defendants were forced to incur significant expense, before and during trial, proving matters that clearly should have been admitted by Reiger. Furthermore, Defendants were improperly forced to use substantial trial time in proving these matters resulting in a wasting of this Court's time. Ordering that Reiger pay to Defendants their expenses in proving these matters at trial will serve the purpose of the Discovery Act, and will help ensure that in the future, due regard is given for considerations of judicial economy.

IV. Conclusion

Under the provisions of Government Code section 12965, Defendants are entitled to recover all their attorneys fees incurred in defending Reiger's

frivolous action, in the full amount of $155,516.25. Reiger's testimony could be accorded no credibility against the weight of other witnesses' testimony, and was exposed as false. Reiger presented no evidence to support two material elements of her claim: That she found the sexual conduct in the office unwelcome, and that, under the totality of the circumstances, including her own actions, the conduct constituted severe harassment. Alternatively, the Court must grant the Corporation and Artenstein, the costs of proving matters that were improperly denied by Reiger in her response to requests for admissions, in the amount of $33,390.00.

Dated: December 23, 1999
Respectfully submitted,
Sheridan & Carroll, LLP
/s/ Susan J. Sheridan
Susan J. Sheridan
Attorneys for Defendant Clayeo C. Arnold

Dated: December 23, 1999.
Respectfully submitted,
Law Offices of Anthony J. Poidmore
/s/Anthony J. Poidmore,
Anthony J. Poidmore,
Attorneys for Defendants Susan M. Artenstein
and
Clayeo C. Arnold, a Professional Law Corporation

(EOR at pp. 437 to 444)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

NO. 97AS03390

MELANIE RIEGER,

Plaintiff

vs.

CLAYEO C. ARNOLD, a Professional Law Corporation, CLAYEO C. ARNOLD, AND SUSAN M. ARTENSTEIN and DOES 1 through 10, inclusive,

Defendants.

Date: February 9, 2000
Time: 9:00 a.m.
Dept. 64
Judgment Entered: October 29, 1999

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF DEFENDANTS FOR ATTORNEYS' FEES AND COSTS

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

COMES NOW plaintiff MELANIE RIEGER, and for herself alone, and submits the following Memorandum of Points and Authorities in Opposition to the joint motion of defendants for attorneys' fees and costs.

Dated: January 28, 2000

BRAYTON, PURCELL, CURTIS & GEAGAN

/s/ Clayton W. Kent
CLAYTON W. KENT

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants have filed a joint motion to recover claimed attorneys' fees under Government Code Section 12964 and again under Code of Civil Procedure Section 2033. However, as is set forth below, defen-

dants are not entitled to recover their fees on several grounds. First, the motion is untimely and not in compliance with the Code of Civil Procedure; second, even if the motion is deemed timely, defendants cannot and have not demonstrated that plaintiff's action was frivolous, unreasonable or groundless as required by Government Code Section 12965(b) and, additionally, defendants have failed to apportion the alleged attorneys' fees as between each of the consolidated matters so that this Court can properly exercise its discretion under Code of Civil procedure Section 1033. For the reasons set forth below, plaintiff requests that the present motion be denied in its entirety and that no award of attorneys' fees and costs be rendered in accordance therewith.

II.

DEFENDANTS' MOTION FOR ATTORNEYS' FEES IS UNTIMELY AND MUST BE DENIED

As is evident from the motion of defendants, the same was served on December 23, 1999, nearly two months after the entry of the judgment. California Rules of Court Rule 870 provides:

> A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . .

In the instant case, the judgment was served by the clerk on October 29, 1999, and, consequently, all

costs sought must have been served within the 15 day period provided in the aforementioned rule. Furthermore, California Code of Civil Procedure, Section 133.5 includes statutory attorneys' fees as an item of costs:

> (a) the following items are allowable as costs under Section 1032:
>
> ...
>
> 10. Attorneys' fees, when authorized by any of the following:
> (B) Statute.

The statutory language of the statute the Civil Procedure Code section including attorneys' fees as an element of costs is unambiguous and, consequently, it has been held that a motion for attorneys' fees must be filed no later than the filing of a cost memorandum. Russell v. Trans Pacific Group (1993) 19 Cal.App.4th 1717, 1723, 24 Cal.Rptr. 2d 274. Since defendants did in fact file a memorandum of costs, arguable, however, not within the 15 day statutory period, which is the subject of another pending motion, and failed to file their motion for attorneys' fees until a substantial time after the 15 day period had elapsed, defendants' motion is untimely and must be denied.

III.

DEFENDANTS HAVE NOT DEMONSTRATED THAT PLAINTIFF' S ACTION WAS FRIVOLOUS, UNREASONABLE OR GROUNDLESS

Defendants seek attorneys' fees as a prevailing

party under the provisions of Government Code Section 12965(b) which provides, in pertinent part:

> In actions brought under this section, the Court, in its discretion, may award to the prevailing party reasonable attorneys' fees and costs.

The above cited Code section has been interpreted by the Courts to require that the Court has discretion to award attorneys' fees only upon funding that plaintiff's action was frivolous, unreasonable or groundless or that plaintiff continued to litigate after it clearly became so. Moss v. Associated Press, (C,D, Cal.996) 956 F.Supp. 891. Additionally, "the fact that a plaintiff fails to prevail is not controlling and should not be given undue consideration." Moss, supra, at p. 893. The Moss Court relied upon the United States Supreme Court decision in Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2d 648, and quoted:

> " [I]t is important that a district court resist the temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air tight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of dis-

> crimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Christiansburg at 420-24.

Defendants have gone to great lengths to attempt to line up all of their witnesses to show how they conclusively established various factual matters which they allege demonstrates plaintiff' s claim was frivolous. However, as this Court recalls, and as is evidenced by the transcript of this proceeding, the witnesses relied upon in defendants' moving papers were all clearly demonstrated to be biased and/or gave conflicting stories of numerous events throughout the course of the trial. Furthermore, since the jury did in fact render a verdict in favor of plaintiff indicating that the corporation and Susan Artenstein failed to prevent harassment in the workplace substantiates the undisputable fact that plaintiff' s claim was not frivolous, unreasonable or groundless, and, further, that it never became so. Defendants have merely put forth self-serving witnesses who all are tied to the defendants and merely reiterated their own case without providing any substantial evidence of the elements necessary to entitle them to attorneys' fees. The fact that this matter went to a jury in and of itself is conclusive

evidence that plaintiff's action was not frivolous and is sufficient in and of itself to deny defendants' claim for attorneys' fees. As a result, defendants' motion must be denied in it entirety.

IV.

DEFENDANTS HAVE FAILED TO APPORTION THE ATTORNEYS' FEES BETWEEN EACH OF THE CONSOLIDATED CASES IN ORDER TO ALLOW THIS COURT TO PROPERLY EXERCISE ITS DISCRETION, AND, CONSEQUENTLY, THE MOTION SHOULD BE DENIED

As this Court is aware, the trial of this matter concerns two consolidated cases, Rieger v. Arnold and Arnold v. Rieger. It is evident from a reading of the bills submitted by counsel for defendants that the bills contain time spent on the preparation of the case in which the defendants were the plaintiffs, i.e., Arnold v. Rieger. As a result, defendants are not entitled to an award of any attorneys' fees expended in prosecution of that claim, and, absent appropriate allocation, this Court is unable to ascertain what fees were reasonably incurred in defense of the sexual harassment claim.

It is vital that the attorneys' fees be apportioned between the various cases and parties because this Court has discretion under Code of Civil Procedure Section 1033 to deny any costs that pertain to the case of Arnold v. Rieger due to the fact that said plaintiff recovered only the sum of $237.50, clearly an amount that could have been rendered in a small claims court. Since the present motion for attorneys' fees has not

been apportioned, it is virtually impossible to adequately determine what costs and/or attorneys' fees the Court must decide are subject to Section 1033 and, further, what attorneys' fees are not governed by Government Code Section 12965(b). Absent such allocation, this Court is powerless to determine what claimed fees were in fact reasonable and necessary and possibly recoverable under the Government Code.

Additionally, absent apportionment and/or allocation of the claimed attorneys' fees, this Court is unable to determine what fees were expended on behalf of what client. This allocation is necessary should this Court determine that any defendant is entitled to reimbursement of its proportion of attorneys' fees.

Where a prevailing party incurs costs jointly with one or more parties, the issue of apportionment and/or allocation arises. Fennessy v. DeLeuw Cather Corp. (1990) 218 CA3d 792,267 Cal.Rptr. 772. A more recent case dealing with allocation of costs in a matter that had been consolidated is Slavin v. Fink, (1994) 25 Cal.App.4th 722, 30 Cal.Rptr.2d 750. In that case, a contractor filed suit against the homeowner's agent (Fink) and filed a separate action against the homeowner individually. The cases were subsequently consolidated, and a judgment was thereafter rendered in favor of Fink. Fink sought costs as a prevailing party. The trial court made a determination that the majority of the costs were incurred for the benefit of non-prevailing defendant and allocated the costs accordingly. The appellate court upheld the trial court's finding based upon the facts that Fink was the agent for the homeowner and held that "it would have been unjust to allow appellant to impose upon respon-

dent all cost incurred which benefitted both appellant and Borinstein (homeowner)." Slavin, supra at page 52. Because of the relationship of the defendants and the "unity in interest" between them, it was determined that the trial court properly exercised its discretion in determining allocation between the parties.

As a result, defendants have not met their burden in establishing entitlement to attorneys' fees in any amount, and their present motion must be denied.

V.

DEFENDANTS ARE NOT ENTITLED TO ATTORNEYS' FEES AND COSTS UNDER SECTION 2033

Defendants have made numerous representations to this Court with respect to the evidence that was admitted at the trial. For example, defendants assert that "it was clearly established that Rieger did, in fact, stretch and place a condom over the mouthpiece of the telephone located in Arnold's private office." (Moving papers, points and authorities, p. 15, lines 1-2.) What the defendants fail to inform the Court is that the true testimony was that there was conflicting statements by defendants own witnesses as to who was present in the room and who saw what occur. None of the witnesses identified in the moving papers testified that they "witnessed the event."

This type of misrepresentation to the Court is replete throughout defendants' request for attorneys' fees based upon a request for admissions. Despite such blatant misrepresentations, however, even if the same

were true, defendants have still not demonstrated their entitlement to an award of attorneys' fees under Section 2033. It is clear that the burden is on the moving party and they must set forth specific facts supporting the amount of sanctions sought. Additionally, conclusionary statements by counsel are not sufficient. Garcia v. Hyster Co. (1994) 28 Cal.App.4th 724, 737, 34 Cal.Rptr.2d 283, 290. Here, defendants merely make a random guess of how much attorneys' fees were expended in allegedly conclusively proving the matters denied by plaintiff. Such conclusionary statements are not sufficient, and, consequently defendants have failed to meet their burden. Additionally, sanctions may not be imposed under the following circumstances:

> (1) An objection to the request was sustained or a response to it was waived under subdivision (1),
> (2) The admission sought was of no substantial importance,
> (3) The party failing to make the admission had reasonable ground to believe that the party would prevail on the matter, or
> (4) There was other good reason for the failure to admit. Code of Civil Procedure, Section 2033(o).

Thus, as long as the plaintiff had complied with any of the above stated elements, defendants cannot be awarded their fees. Despite the lineup of less than credible witnesses that defendants have put forth in

their moving papers in an effort to allegedly support their establishment of the truth of matters denied by plaintiff, plaintiff still had a reasonable ground to believe that she would prevail on the matter. Furthermore, defendants have put forth no evidence that the requested matters denied by plaintiff were each individually of substantial importance. Absent proof that each individual admission was of substantial importance, the cost of proof sanction cannot be imposed. Brooks v. American Broadcasting Co. (1986) 179 Cal.App.3d 500, 224 Cal.Rptr. 838. The contradictory testimony by the witnesses listed in defendants' moving papers further demonstrates the reasonable belief that plaintiff would prevail on this matter. Such conflicting testimony, in conjunction with the jury's actual verdict awarding plaintiff $15,000 demonstrates that plaintiff's belief was not only reasonable but justified.

Since defendants' moving papers merely reassert their own contentions and are wholly devoid of any evidence that such matters were conclusively established (other than their own conclusionary statements), defendants have not met their burden and sanctions in the form of attorneys' fees and casts must not be awarded.

Finally, defendants assertion that they are entitled to any Lodestar amount is ludicrous. A Lodestar amount is typically a multiplier used in situations which are either class actions or matters under which attorneys' fees are awarded under the private attorney general theories. This case was neither a class action nor an action brought for the benefit of the general public, and, consequently, any

use of Lodestar amount would be error. The very cases cited by defendants in support of their Lodestar amount all refer to either class actions or private attorney general actions (see Serrano I, SerranoII, and Beasley v. Wells Fargo Bank cited by defendants. Any such analysis of a Lodestar amount by this Court is incorrect and defendants must not be awarded the same.

VI.

CONCLUSION

As is more fully set forth above, defendants have failed to timely file their motion for attorneys' fees, have failed to establish entitlement to an award for attorneys' fees and have failed to provide the requisite apportionment of the claimed fees in order for this Court to properly award the same. As a result, defendants are not entitled to any attorneys' fees under either Government Code Section 12965(b) or Code of Civil Procedure Section 2033(o). Therefore, plaintiff respectfully requests that this Court deny defendants' motion in it entirety.

DATED: January 28, 2000

BRAYTON, PURCELL, CURTIS & GEAGAN

/s/ Clayton W. Kent
CLAYTON W. KENT

(EOR at pp. 446 to 452)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

NO. 97AS03390

MELANIE REIGER, (sic)

Plaintiff

vs.

CLAYEO C. ARNOLD, a Professional Law Corporation, CLAYEO C. ARNOLD, AND SUSAN M. ARTENSTEIN and DOES 1 through 10, inclusive,

Defendants.

AND ASSOCIATED CROSS-ACTION

Date:	February 9, 2000
Time:	9:00 a.m.
Dept.	64
Entered:	October 29, 1999

Attorneys for Defendants and Cross-Plaintiffs Clayeo C. Arnold, a Professional Law Corporation, Clayeo C. Arnold, and Susan M. Artenstein

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Reply Memorandum of Points and Authorities in Support of Defendants' Joint Memorandum for Attorneys' Fees and Costs.

I. Introduction

Plaintiff Melanie Reiger ("Reiger") contends that the Court should deny the attorneys' fees motion of Defendants Clayeo C. Arnold, a Professional Law Corporation ("the Corporation"), Clayeo C. Arnold ("Arnold") and Susan M. Artenstein ("Artenstein") for four reasons: because it is untimely, because Defendants have not demonstrated that Reiger's action was frivolous, unreasonable or groundless; because Defendants have failed to apportion their attorneys fees between the consolidated cases; and because Defendants have not demonstrated that Reiger improperly denied matters that should have been

admitted during discovery. Each of these contentions is false, and is unsupported by either the circumstances of this motion or by legal authority.

A. Defendants' Attorneys' Fees Motion is Timely.

Reiger's contention that Defendants motion for attorneys' fees is untimely is premised upon a misreading of applicable law, and relies upon case authority that is not only distinguishable, but that may not properly be cited on the issue of the timeliness of an attorney fee motion. Judgment was entered in this action on October 29, 1999, after a hearing to resolve a dispute between the parties regarding the content of the judgment. A Notice of Entry of Judgment was filed and served by Defendants, as the prevailing parties, on November 18, 1999. [1]

The procedure for filing a notice of motion for attorneys fees is governed by Rule of Court 870.2, which provides that when, as here, "the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statue or contract refers to 'reasona ble'

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[1] The issue of whether October 29, 1999, or November 18, 1999, is the controlling date is fully briefed in the papers supporting and opposing Reiger's Motion to Strike. Defendants hereby incorporate by reference the arguments made in their opposition to the Motion to Strike regarding the effectiveness of the November 18, 1999, Notice of Entry of Judgment.

fees," [2] or otherwise, " [a] notice of motion to claim attorney fees for services up to and including the rendition of judgment in the trial court shall be served and filed within the time for filing a notice of appeal under rules 2 and 3." [3] (Rule of Court 870.2.) As Reiger, concedes, this motion was filed and served on December 23, 1999, only 35 days after service of Notice of Entry of Judgment.

Reiger contends that Code of Civil Procedure section 1033.5, which refers to attorneys' fees as a permissible element of cost, *requires* that a fee motion be filed within 15 days of entry of judgment-as a memorandum of costs must be. This contention is false. Section 1033 merely permits that a fee motion may be brought at the same time as a memorandum of costs, along with three other alternatives as follow:

> Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a notice of motion; (B) at the

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[2] Government Code section 12965, under which Defendants claim attorneys' fees here, provides in relevant part as follows: refers "In actions brought under this section, the court, in its discretion may award to the prevailing party *reasonable attorney fees* and costs except where such action is filed by a public agency or a public official, acting in an official capacity."

[3] These provisions provide that, at the earliest, the notice of appeal must be filed within 60 days from service of the Notice of Entry of Judgment. (Rule of Court 2.)

> time a statement of decision is rendered; (C) upon application supported by affidavit made concurrently with a claim for other costs; or (D) upon entry of default judgment.

(Code. Civ. Proc. § 1033.5.)

Reiger also relies upon *Russell v. Trans Pacific Group* (1993) 19 Cal. App. 4th 1717, 1723, to support its timeliness argument. However, *Russell* related to an attorney fee motion brought under contract, and was decided under *former* Rule of Court 870.2 which stated that "[a]ny notice of motion to claim attorney fees as an element of costs under Civil Code section 1717 [4] shall be served and filed before or at the time of the memorandum of costs is served or filed." Rule of Court 870.2 was amended effective January 1, 1994, eliminating the provisions relied upon in *Russell*. That *Russell* is no longer good authority is established by *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal. App. 4th 698, 705-706.

Clearly, under the plain language of Rule of Court 870.2, Defendants' motion is timely.

B. Defendants Have Established That Reiger's Action Was Frivolous

Defendants have already illustrated exhaustive-

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[4] Civil Code section 1717 specifically concerns the recovery of attorney's fees under action on contract.

ly the reasons that Reiger's action should be deemed frivolous. (See Memorandum of Points and Authorities, Section II.A.) In response, Reiger has presented nothing more that a hollow denial. She cites neither evidence adduced at trial nor any legal authority to demonstrate that her action had merit. Instead she casts generalized aspersions of bias at Defendants' witnesses and makes the ridiculous assertion, again without authority, that "[t]he fact that this matter went to a jury in and of itself is conclusive evidence that plaintiff's action was not frivolous and is sufficient in and of itself to deny defendants' claim for attorneys' fees."
(Reiger's Opposition, pp. 3-4.)

The decision in *Bond v. Pulsar Video* (3rd D.C.A. 1996) 50 Cal.App.4th 918, which was discussed in Defendants moving papers, establishes that an action is not *per se* meritorious by virtue of reaching the jury. In *Bond*, the jury reached a defense verdict, the court awarded attorney's fees under Government Code section 12965 to the prevailing defendant, and the Third District Court of Appeal affirmed. (*Bond, supra*, 50 Cal. App. 4th at 920-21, 925.) In the absence of any substantive response to Defendants' substantial showing that Reiger's action was frivolous, the Court must conclude that Reiger's action was frivolous, and award Defendants their reasonable attorneys' fees.

C. Defendants Claimed Attorneys' Fees Need Not Be Apportioned; Nevertheless, The Court Has Discretion To Determine An Appropriate Apportionment

In her opposition, Reiger raises two of the same apportionment arguments that she raised in her motion to strike Defendants' memoranda of costs. Here, they are likewise meritless. Reiger contends that the attorneys' fees claimed by Defendants should be apportioned between the litigation of the complaint and the litigation of the cross-complaint, and apportioned between the defendants. [5]

First, requiring Defendants to apportion costs between litigation of the complaint and the cross-complaint would be inappropriate because the issues raised by both pleadings were so closely related that apportionment is impossible. Under such circumstances, court generally award fees for the entire litigation. (See *San Dieguito Partnership v. Joint Powers Authority* (1998) 61 Cal. App. 4th 910. 920 (rejecting apportionment between fee and non fee claims).)

Furthermore, apportionment between the Defendants would not be appropriate. The authority cited by Reiger to support her apportionment argument is clearly distinguishable from this case. *Slavin v. Fink* (1994) 25 Cal. App. 4th 722, involved a cost memorandum filed by a prevailing defendant that included his own costs, and those of a defendant who did not prevail. The court of appeal affirmed the trial court's

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[5] As the Court is aware, the attorneys' fees sought by Defendants are already somewhat apportioned due to the fact that the fees of Sheridan & Carroll and Mitchell & Ison are allocated to Defendant Arnold, and the fees of Anthony Poidmore are allocated to the other defendants.

own apportionment between the two defendants on the grounds that the second defendant had no right to recover costs. (See *Slavin, supra,* 25 Cal.App.4th at 726.) Here, in contrast, all the defendants are prevailing parties. There is no prejudice to Reiger in requiring her to pay all reasonable attorneys' fees to the Defendants in the manner suggested in their moving papers.

Furthermore, in circumstances such as this case, "where several defendants are united in interest and/or join in making the same defenses in the same answer, the allowance or disallowance of an award to prevailing defendants lies within the sound discretion of the trial court." (*Smith v. Circle P. Ranch* (87 Cal. App.3rd 267, 272.) Accordingly, should the Court find that apportionment is appropriate, having tried the case, and being throughly familiar with the evidence, the Court may assess both the reasonableness and necessity of the cost items, and any appropriate apportionment. (See *Slavin, supra,* 25 Cal.App.4th at 724-725.)

D. Defendants Are Entitled To Attorneys' Fees Under Section 2033

Reiger also contends that Defendants should not be allowed their attorneys's fees under Code of Civil Procedure Section 2033 unless each individual admission was of "substantial importance." Under *Brooks v. American Broadcasting Co.* (1986) 179 Cal. App. 3d 500, "substantial importance" is defined as an admission having "at least some direct relationship to one of the central issues in the case, i.e., an issue which, if not

proven, would have altered the results in the case." (*Brooks, supra,* 25 Cal.App.3d 509.) The admissions sought by Defendants during discovery meet this test.

An individual claiming discrimination under a hostile work environment theory, as Reiger did, due to unlawful sexual or gender-based harassment, must show that he or she was subjected to *unwelcome conduct* based on sex or gender, which was sufficiently severe and pervasive to alter the work environment, and did in fact create an abusive working environment. (See *Ellison v. Brady* (9th Cir. 1995) 924 F.2d 872.) In making such a showing, the employee must meet both an objective and a *subjective standard.* Objectively, the employee must show that a reasonable woman (or man) in the same situation would have considered the conduct offensive, severe and pervasive. Subjectively, the employee must show that she (or he) *actually found the conduct offensive, severe and pervasive.* (*Harris v. Forklift Systems* (1993) 510 U.S. 17; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F. 3d 1522.) Even assuming that Reiger could meet the objective test, she clearly could not meet the subjective test. Because Reiger was a major instigator in office sex play, her contention that she found such conduct unwelcome was meritless.

The admissions sought by Defendants were directly related to establishing the central issue of whether Reiger welcomed sexual conduct in the workplace. To use the example raised by Reiger in her opposition papers, establishing that Reiger had placed a condom over the mouthpiece of a telephone demonstrated her willingness to participate in workplace sex play and establishes that she was not offended by the conduct she complained of.

III. Conclusion

Reiger has failed to present a meaningful opposition to Defendants' moving papers. Defendants motion was filed in a timely fashion and it establishes that Reiger's action was frivolous. Furthermore, no apportionment is necessary to award fees under either Government Code section 12965 or Code of Civil Procedure section 2033. For the foregoing reasons, the Court must award Defendants the reasonable attorneys' fees they have requested.

Dated: February 6, 2000.

Respectfully submitted,

Sheridan & Carroll, LLP

/s/ Susan J. Sheridan
Susan J. Sheridan,
Attorneys for Defendant Clayeo C. Arnold

Dated: February 7, 2000.

Respectfully submitted,

Law Office of Anthony J Poidmore

/s/ Anthony J. Poidmore
Anthony J. Poidmore
Attorneys for Defendant Susan M. Artenstein and Clayeo C. Arnold, a Professional Law Corporation

(EOR at pp. 454 to 457)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case Number: 97AS03390 and 97AS00985

Department Number: 64

MELANIE RIEGER,

Plaintiff,

vs.

CLAYEO ARNOLD, ET AL.,

Defendant.

ORDER DISPOSING OF MOTIONS
RELATED TO COSTS AND
ATTORNEY'S FEES

ORDER

In disposition of

1. The motion (filed 8-11-99) of Clayeo C. Arnold (hereinafter "Arnold") seeking an order taxing the costs claimed by Melanie Rieger (hereinafter "Rieger") by a memorandum of costs filed July 29, 1999; and

2. The motion (filed 12-7-99) of Rieger seeking an order striking the memorandum of costs filed by Clayeo C. Arnold, a professional law corporation (hereinafter"corporation") on November 17, 1999 or in the alternative, taxing costs claimed by said memorandum; and,
3. The motion (filed 12-7-99) of Rieger seeking an order striking the memorandum of costs filed by Susan Artenstein (hereinafter "Artenstein") on November 17, 1999; and
4. The motion (filed 12-23-99) of Arnold, corporation and Artenstein for an order awarding each attorney's fees and costs; and,
5. The motion of Rieger (filed 1-6-2000) seeking an order awarding her attorney's fees; and,
6. The motion (filed 1-26-2000) of corporation seeking an order imposing sanctions upon Rieger and her attorneys; and,
7. Every other motion now pending before this court seeking an order determining entitlement to attorney's fees or costs,

IT IS ORDERED THAT each of the foregoing motions is denied except to the extent that it may be granted explicitly in paragraphs 1 and 2 which follow; and,

1) The memorandum of costs filed by Rieger on July 29, 1999 is stricken, and
2) Responsive to the motion (filed 12-23-99) of Arnold, corporation and Artenstein seeking an order awarding each attorneys fees and costs;

a) The recoverable costs (other than attorney's fees) of Arnold are taxed at the sum of $265.00;
b) Attorney's fees are awarded to Arnold in the sum of $66,213.50;
c) The recoverable costs (other than attorney's fees) of corporation are taxed at the sum of $19,626.05;
d) Attorney's fees are awarded to corporation in the sum of $89,302.75;
e) The recoverable costs of Artenstein are taxed at the sum of $185.00.

Discussion

Attorney's fees and costs are claimed by Arnold, corporation and Artenstein pursuant to Government Code section 12965 upon a contention that Rieger's claim was frivolous, unreasonable and without foundation. That is the most benign assessment that can be made of Rieger's claim. It was also brought in bad faith and with the claimant's declared objective "to bring Clay down". It was initiated and prosecuted by the claimant with full knowledge that she was the initiator of and eager participant in, almost all of the sex-oriented horseplay and other gender focused activity that occurred in her workplace or in the company of her co-workers. She knew, from the outset of the litigation, that there was no reasonable basis upon which a claim could be made that she was offended by any of that activity. Her claim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a

malicious desire to harm Arnold. Arnold, corporation and Artenstein are entitled to attorney's fees and costs pursuant to Government Code section 12965.

Although there were claims litigated in these consolidated cases other than the Government Code section 12965 claim, the other claims and the Government Code claim were inextricably intertwined, making it impracticable to separate the attorney's activities and costs into discrete categories specifically attributable to the other claims and the Government Code claims respectively. Moreover, it may be fairly said that, had the Government Code claim not been litigated, almost all of the litigation expense would have been unnecessary. In other words, almost all of the litigation expense was attributable to litigation of the Government Code claim.

Notwithstanding the Arnold motion filed 8-11-99 is denominated a motion to tax costs claimed in the Rieger cost bill (filed 1-29-99), it is regarded as one seeking an order striking the cost bill.

In the overall context of this litigation, Arnold, corporation and Artenstein are regarded as the prevailing parties.

The Court exercises its discretion as to allow them to recover costs and attorney's fees, to the extent that such allowance is discretionary.

Dated: February 15, 2000

/s/ John J. Golden
Honorable JOHN J. GOLDEN,
Judge of the Superior Court of California,
County of Sacramento

(EOR at pp. 458, 459)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No.: 97AS00985

MELANIE RIEGER,

Plaintiff,

v.

CLAYEO C. ARNOLD, A PROFESSIONAL LAW CORPORATION, CLAYEO C. ARNOLD; SUSAN M. ARTENSTEIN, and DOES 1 through 10, inclusive,

Defendants.

CLAYEO C. ARNOLD and CLAYEO C. ARNOLD, A Professional Law Corporation,

Plaintiffs,

vs.
MELANIE RIEGER, and DOES 1 through 10, inclusive,

Defendants.

JUDGMENT ON ORDER
DISPOSING OF MOTIONS
RELATED TO COSTS AND
ATTORNEYS FEES

By order dated February 15, 2000, the court having disposed of all pending issues and motions concerning costs and attorneys's fees, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

No party shall recover anything from any other party except that CLAYEO C. ARNOLD, A PROFESSIONAL LAW CORPORATION shall recover from MELANIE RIEGER the sum of $237.50, plus its costs of suit incurred herein in the sum of $19,626.05 and attorney's fees in the sum of $89,302.75; CLAYEO C. ARNOLD shall recovery (sic) from MELANIE RIEGER his costs of suit incurred herein in the sum of $265.00 and attorney's fees in the sum of $66,213.50; SUSAN M. ARTENSTEIN shall recovery (sic) from MELANIE RIEGER her costs of suit incurred herein in the sum of $185.00.

Dated: April 12, 2000

/s/ John J. Golden
JUDGE OF THE SUPERIOR COURT

Approved as to form:
BRAYTON, PURCELL, CURTIS & GEEGAN (sic)

By: /s/ Clayton W. Kent
Clayton Kent, Esq.
Attorney for MELANIE RIEGER

(Page 44 of Creditors' Brief before the Court of Appeal, Third Appellate District, California, found at page 1057 of Debtor's Appendix, Volume two, in Docket Number 27 before the Eastern District Court)

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[T]he joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required. (Akins v. Enterprise Rent-A-Car Col. (2000) 79 Cal. App.4th 1127, 1133).

The trial court found that all the claims were "inextricably intertwined" and further that, "it may fairly be said that, had the Government Code claim not been litigated, almost all of the litigation expense would have been unnecessary. In other words, almost all of the litigation expense was attributable to litigation of the Government Code issue." (AA 1632) This finding was supported by the Respondent's evidence supporting their attorney's fees motion (AA 1274; 1450 and Rieger has made no attempt to dispute this point. Accordingly, the amount of attorney's fees awarded by the trial court was proper.

Rieger also complains that the size of the fee

award is, "a financially crippling penalty against her." [15] (Opening Brief 24) She evidently misunderstands the basis for fee awards. Unlike punitive damages, attorney's fees are not based on a party's net worth. They are awarded to compensate a prevailing party for the expense it incurred. "[A] party who qualifies for a fee should recovery for all hours reasonably spent unless special circumstances would render an award unjust." (Vo v. Las Virgenes Municipal Water District (2000) 79 Cal.App.4th 440, 446) *The trial court did not assess a penalty against Rieger. It compensated Respondents for the substantial expense she caused them by bringing this lawsuit in bad faith. (Emphasis added herein)*

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(This page was erroneously omitted from the Excerpts of Record presented to the Ninth Circuit Court. The Court on October 8, 2009 granted leave for it to be inserted)

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[15] (Footnote omitted herein)

(EOR at pp. 296, 297)

***** [1]

"V.

The trial court found the plaintiff made a FEHA claim that was not only frivolous but also made in bad faith, 'initiated and prosecuted . . . with full knowledge that she was the . . . eager participant in [] almost all of the sex-oriented horseplay and other gender focused activity that occurred in her workplace or in the company of her co-workers." It thus ordered her to pay the costs and legal fees of the defendants. (Gov. Code, §12965, subd. (b)). The plaintiff asserts the award was erroneous. We disagree.

A prevailing defendant in a FEHA action may recover legal fees only if the action was frivolous, unreasonable, without foundation, or brought in bad faith. (*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1229-1230; *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383; 1386-1388 (*Cummings*).) We review the award of legal fees for an abuse of discretion. (*Cummings, supra,* 11 Cal.App.4th at p. 1387) Contrary to the plaintiff's assertion, we do not need express findings if there is an adequate basis in the record to resolve the arguments. (*Id.* At p. 1388)."

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[1] This is a section of the published opinion of the Court of Appeal of the State of California, Third Appellate District in the matter of Rieger v. Arnold, C034625, C035383, contained at pages 29, 30 of the opinion.

(EOR at pp. 303, 304)

***** [1]

"IX

In an abbreviated afterthought, the defendants request an award of their legal fees expended on this appeal, because it represented a continuation of FEHA litigation after it became objectively frivolous to do so. (Citations omitted) While the remainder of the plaintiff's arguments on appeal can be considered frivolous, she did present a novel and significant issue regarding the interpretation of section 1106 that required a published opinion to resolve. The frivolous issues, on the other hand, required little effort to dispatch. We thus exercise our discretion to deny the request for reimbursement of appellate legal fees in its entirety."

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[1] This is a section of the published opinion of the Court of Appeal of the State of California, Third Appellate District in the matter of Rieger v. Arnold, C034625, C035383 contained at pages 36, 37 of the opinion.

(EOR at pp. 90 to 95)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Chapter 7
Case No: 05-22777 D 7
Adv. No. 05-2225-D

In re

MELANIE HUGHES,

Debtor

CLAYEO C. ARNOLD, and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION,

Plaintiffs,

vs.

MELANIE HUGHES,

Defendant.

Attorneys for Creditors
Clayeo C. Arnold and
Clayeo C. Arnold, Professional Law Corporation

HUGHES & PRITCHARD, LLP
Gregory J. Hughes #071288
Amelia Ryan Pritchard #196902
980 9th Street, Suite 1600
Sacramento, CA 95814
Telephone (916) 774-7506
Facsimile (916) 449-9501

COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBTS AND FOR DENIAL OF DISCHARGE

CLAYEO C. ARNOLD (" Arnold") and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION ("PLC:) jointly Plaintiffs, through their attorneys, Hughes & Pritchard, LLP allege: [1]

*****

FIRST CAUSE OF ACTION

(11 U.S.C. § 523 - Wilful (sic) and Malicious Injury by the Debtor to Clayeo C. Arnold)

11. The Plaintiffs reallege and incorporates (sic) by this reference each and every allegation of paragraphs

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[1] Because the Bankruptcy Court granted partial summary judgment on only the First and Second causes of action of plaintiffs' adversary complaint pursuant to 11 U.S.C. § 523 (a) (6) (and the only two causes of action from which this appeal lies) the Third and Fourth causes of action (pursuant to 11 U.S.C. § 727) have been omitted herein. The complete complaint can be found at EOR pp. 90 to 95)

1 through 22 as though fully set forth.

12. The Debtor filed and pursued the Rieger v. Arnold case in 1997 deliberately and intentionally to cause injury to Arnold. The Court found that the claims and continued pursuit of the claims by the Debtor were done with a malicious desire to harm Arnold and awarded Arnold attorneys fees and costs in the amount of $66,478.50 at 10% interest.

13. Pursuant to 11 U.S.C. §523(a)(6), the judgment debt to Arnold is non-dischargeable.

SECOND CAUSE OF ACTION

(11 U.S.C. §523 - Wilful (sic) and Malicious Injury by the Debtor to Clayeo C. Arnold (PLC).

14. The Plaintiffs reallege and incorporates (sic) by this reference each and every allegation of paragraphs 1 through 13 as through fully set forth.

15. The Debtor filed and pursued the Rieger v. Arnold case in 1997 deliberately and intentionally to cause injury to PLC. The court found that the claims and continued pursuit of the claims by the Debtor were done with a malicious desire to harm PLC and awarded PLC attorneys fees and costs in the aggregate amount of $108,928.80, at 10% interest.

16. Pursuant to 11 U.S.C. §523(a)(6), the judgment debt to PLC is non-dischargeable.

*****

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

a. Pursuant to 11 U.S.C. § 523(a)(6), an order determining that the debt of $100,227.72, accruing at 10% interest, owed to Clayeo C. Arnold is non-dischargeable;
b. Pursuant to 11 U.S.C. § 523(a)(6, an order determining that the debt of $153,105.13, accruing at 10% interest, owed to Clayeo C. Arnold, PLC is non-dischargeable.
c. For an order denying the Debtor a discharge under 11 U.S.C. §727;
d. For costs of suit incurred herein; and
e. For such other and further relief as the court deems just.

Dated: June 14, 2005

Hughes and Pritchard, LLP

By: /s/ Amelia Ryan Pritchard
Amelia Ryan Pritchard, Attorney for Plaintiffs
Clayeo C. Arnold

(EOR at pp. 252,253)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 05-22777-D-7
Adv. Pro. No. 05-2225-D
Docket Control No. ARP-4

In re:

MELANIE HUGHES,

Debtor.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION,

Plaintiffs,

v.

MELANIE HUGHES

Defendant.

(Filed August 24, 2007)

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT IN PART

The Court having issued a Memorandum Decision in the matter of the Plaintiff's Motion for Partial Summary Judgment, and good cause appearing,

IT IS HEREBY ORDERED:

1. The motion of Plaintiff Clayeo C. Arnold for summary judgment on the first cause of action of Plaintiffs' complaint herein is granted, and the debt of Defendant Melanie Hughes to Plaintiff Clayeo C. Arnold on account of the costs and attorney's fees awarded by the Sacramento County Superior Court in Rieger v. Arnold , Case No. 97AS03390, is hereby declared to be nondischargeable pursuant to 11 U.S.C. § 523 (a) (6);

2. The motion of Plaintiff Clayeo C. Arnold, Professional Law Corporation, for summary judgment on the second cause of action of Plaintiffs' complaint herein is granted, and the debt of Defendant Melanie Hughes to Plaintiff Clayeo C. Arnold, Professional Law Corporation, on account of the costs and attorney's fees awarded by the Sacramento County Superior Court in Rieger v. Arnold , Case No. 97AS03390, is hereby declared to be nondischargeable pursuant to 11 U.S.C. § 523 (a) (6);

3. The motion of Plaintiffs Clayeo C. Arnold and Clayeo C. Arnold, Professional Law Corporation, for an order determining that any debts resulting from the malicious prosecution litigation being pursued by Plaintiffs in state court, other than the debts comprised of the cost and attorney's fee awards referenced in

subparagraphs 1 and 2 of this order, are nondischargeable is denied;

4. Because the parties dispute the amounts due and owing on the costs and attorney's fee awards, the amounts of the awards determined hereby to be nondischargeable will be determined by the court upon subsequent motion to be filed by the Plaintiffs.

Dated: August 24, 2007

/s/ Robert Bardwil
Robert S. Bardwil
United States Bankruptcy Judge

(EOR at pp. 1,2)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 05-22777-D-7
Adv. Pro. No. 05-2225-D
DC Nos. ARP-4, ARP-6

In re:

MELANIE HUGHES,

Debtor.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION,

Plaintiffs,

v.

MELANIE HUGHES

Defendant.

(Filed March 3, 2008)

JUDGMENT ON CAUSES OF ACTION ONE AND TWO

The Court having issued an Order Granting Motion for Partial Summary Judgment in Part, filed August 24, 2007, together with a civil minute order, filed February 19, 2008, granting the Plaintiffs' motion to determine the amounts of nondischargeable debts, and the court having issued an order this date directing entry of a final judgment in this adversary proceeding, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Judgment is granted in favor of plaintiff Clayeo C. Arnold on the first cause of action of Plaintiffs' complaint herein, in the amount of $122,702.37, as of February 13, 2008, and the debt evidenced by such judgment is hereby declared to be nondischargeable pursuant to 11 U.S.C. § 523 (a) (6);

2. Judgment is granted in favor of plaintiff Clayeo Arnold, Professional Law Corporation, on the second cause of action of Plaintiffs' complaint herein, in the amount of $190,237.01, as of February 13, 2008, and the debt evidenced by such judgment is hereby declared to be nondischargeable, pursuant to 11 U.S.C. § 523 (a) (6);

3. There being no just reason for delay, this judgment is hereby deemed a final judgment upon its entry by the court, pursuant to Federal Rule of Civil Procedure 54(b), made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7054(a).

Dated: March 3, 2008

/s/ Robert Bardwil
Robert S. Bardwil
United States Bankruptcy Judge

App. 153

(EOR p. 3079)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO: 2:08-CV-00490 JAM

MELANIE HUGHES,

v.

CLAYEO C. ARNOLD,

JUDGMENT IN A CIVIL CASE

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT' S ORDER OF 8/12/08

Victoria C. Minor
Clerk of the Court
ENTERED: August 12, 2008

by: /s/ M. Marciel
Deputy Clerk

(EOR at pp. 3062 to 3077)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

District Court Case Number
CIV: 2:08CV-00490 JAM

Bankruptcy Court Case Number
NO. 05-22777-D-7

Adversary Proceeding Number
NO. 05-2225-D

In re
MELANIE HUGHES

Appellant and Debtor.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION

Appellees and Plaintiffs,

v.

MELANIE HUGHES,

Appellant and Defendant.

Date: October 1, 2008
Time: 9:00 a.m.
Dept: Courtroom 6, 14th Floor

Attorney for Appellant
Melanie Hughes
2150 Capitol Avenue, Suite 100
Sacramento, CA 95816
Telephone: (916) 444-7704
Fax No: (916) 442-5435

NOTICE OF MOTION AND
MOTION FOR REHEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES

Please take notice that on October 1, 2008, or as soon thereafter as the parties may be heard, Debtor Melanie Hughes (Debtor) will bring on for hearing a motion for rehearing. This motion is made pursuant to Federal Rules of Bankruptcy Procedure, Rule 8015 and is based upon the grounds that:

1. The District Court failed to follow binding precedents regarding the issue of whether the exception from discharge found in 11 U.S.C. Section 523(a)(6) is limited to debts which are based upon the commission of an intentional tort;

2. Since the District Court identified malicious prosecution as the underlying tort upon which the exception to discharge was based, the District Court must consider the recent (August 4, 2008) Dismissal with Prejudice Creditors' filed in state court dismissing the action they filed against Debtor for malicious

prosecution which requires, through the application of *res judicata*, that the debt be determined to be dischargeable (**Exhibit A** to the Declaration of Melanie Rieger Hughes); and

3. The District Court misapplied the doctrine of collateral estoppel to achieve its desired result.

This motion is based upon this notice and motion, the memorandum of points and authorities, the complete case file in this proceeding, the matters relating to the state court malicious prosecution action which was dismissed with prejudice on August 4, 2008, declaration of Melanie Rieger Hughes and any other matters which may be presented.

DATED: August 20, 2008

/s/ Melanie Hughes
Melanie Hughes
Debtor/Appellant in Pro Per

INTRODUCTION

The District Court's Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order issued August 11, 2008 (hereafter "Order") fails in all respects to align with binding precedents which unequivocally, unambiguously, and without question state that:

> "for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commission of an intentional tort."

By this motion for rehearing, Debtor offers new evidence for the court to review and asks the court to direct its attention to this new evidence, and in light of the new evidence, answer questions which were raised by the instant appeal which have yet to be specifically analyzed by the district court when it addressed this case *de novo*.

Debtor is confident that were the Court to address the new evidence that once-and-for-all disposes of the notion that Debtor's "conduct in initiating and prosecuting her sexual harassment claim constituted tortious conduct"[1] or whether malice was actually litigated in the FEHA case through the attorney fee award motion or for the first time on Appeal in the Third District Court of Appeals, [2] this court will be compelled to determine that it had not been previously litigated and that the underlying debt is indeed dischargeable.

Alternatively, if the Court's decision of August 11, 2008 were to remain unchanged, the additional clarification of the questions raised by this motion for rehearing, if answered, will prevent the parties from being required to address a remand from the Ninth Circuit Court of Appeal for clarification purposes and would provide a full record from which to review this Court's decision.

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1 "Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order" at p. 10: lines 20 to 24.

2 "Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order" at p. 14: lines 5 to 6.

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE DISTRICT COURT'S FAILURE TO FOLLOW BINDING PRECEDENTS HOLDING THAT THE EXCEPTION TO A DISCHARGE UNDER 523(a)(6) IS LIMITED TO DEBTS WHICH ARE BASED UPON THE COMMISSION OF AN INTENTIONAL TORT IS FATAL TO THE ORDER

Debtor is of the opinion that the District Court understands that to except a debt from discharge, the debt must be based upon the commission of some tort or tortious conduct. Apparently, however, the District Court disagrees with the express holding of *Geiger v. Kawaauhau*, 113 F.3d 848 (8th Cir. 1997) wherein the Court stated in clear and unambiguous language not subject to interpretation by the District Court that:

> "we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'."

Geiger 113 F.3d at 853.

The *Geiger* Court identified the rule as follows:

> "the correct rule is that a judgment debt cannot be exempt from discharge in bankruptcy unless it is based on what the law has for generations called an intentional

> tort, a legal category that is based on 'the consequences of an act rather than the act itself'."

Geiger at 113 F.3d at 852.

The United States Supreme Court, in *Kawaauhau v. Geiger* , 523 U.S. 57, 118 S.Ct. 974 (1998) *EXPRESSLY AFFIRMED* the Eighth Circuit. The Supreme Court, whose interpretation of Section 523(a)-(6) relieves this court of any authority or responsibility for interpreting the scope of Section 523(a)(6), affirmed the Eighth Circuit,

> "holding that § 523(a)(6)' s exemption from discharge is confined to debts for an intentional tort". *Kawaauhau* at 523 U.S. at 57

Finally, the Ninth Circuit, in *Ditto v. McCurdy*, 510 F.3d 1070, (9th Cir. 2007), adhered to the United States Supreme Court decision in *Kawaauhau*, supra, stating that

> "the Supreme Court clarified that the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'"

Ditto 510 F.3d at 1076.

How is it that the District Court, given these decisions, is of the opinion that the United States Supreme Court, the Ninth Circuit, and the Eighth Circuit did not mean what they said? The rule is

simple and straightforward. The District Court is required to follow them, not interpret them. Why do these rules not apply to the instant case? It is not unfair for a citizen to request from the judiciary the clarity and specificity that the judiciary demand of the citizen.

The rule is simple and it is only through an elaborate play on words that this court has found a way to ignore that which cannot be ignored. The rule is as stated in Debtor' s briefs. While the District Court is free to disagree with Debtor, the District Court is not free to disagree with and ignore the United States Supreme Court, the Ninth Circuit and Eighth Circuit Courts of Appeal.

Debtor refers the District Court to the phrase *stare decisis et non quieta movere*. Since the United States Supreme Court, the Ninth Circuit, and the Eighth Circuit have established the rule and interpretation of the breadth of Section 523(a)(6), the District Court is REQUIRED to adhere to the rule and interpretation announced. There is no room for the District Court to ignore the law and instead rely on cases that do no address the issue of the existence of an intentional tort. [3]

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3 The District Court's reliance on *In re Jercich*, 238 F.3d 1202 (9th Cir. 2001) is misplaced. The Court in *In re Jercich* was not asked to interpret the scope of Section 523(a)(6) *vis a vis* intentional torts, thus, the District Court must assume that the 9th Circuit understood that an intentional tort was required and simply found that the conduct fit the parameters of an intentional tort. This is borne out by the award of punitive damages against the *Jercich* debtor under Civil Code § 3294, which damages are limited to "oppression, fraud, or malice". Punitive damages are

It is respectfully requested that the District Court, at a minimum, modify any order it may finally make to QUOTE verbatim the holdings of the United States Supreme Court, the Ninth Circuit and the Eighth Circuit cited above and then explain, if it can, why these holdings do not bind the District Court.

The ideal result would be that the District Court follow the precedents and reverse the bankruptcy court's order of nondischargeability that simply cannot stand under the law.

II

TO THE EXTENT THAT THE DISTRICT COURT IDENTIFIED MALICIOUS PROSECUTION AS THE UNDERLYING INTENTIONAL TORT UPON WHICH THE DEBT WOULD BE EXCEPTED FROM DISCHARGE, THE DISTRICT COURT IS SIMPLY WRONG ON SEVERAL LEVELS.

The District Court used malicious prosecution as the conduct supporting the bankruptcy court's decision. For the reasons that follow, it is impossible for the District Court to make such a leap, and to the extent that malicious prosecution does form the basis for this Court's order, the order must be modified.

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available only for a breach of an obligation not arising from contract. Civil Code § 3294(a). In this underlying FEHA action, the jury expressly found that Debtor *did not* act with oppression or malice in pursuing the case. **Appendix, Volume One at 82 - 89, Verdicts numbered 23 and 24**. It is incomprehensible how the District Court, relying on *In re Jercich* , could reach the conclusion that the Debtor in this case acted willfully and maliciously, especially since no part of the record was provided to this court which could support that conclusion.

A. THE BANKRUPTCY COURT EXPRESSLY DENIED CREDITORS' MOTION TO HAVE THE DEBTS BASED UPON THE COMMISSION OF MALICIOUS PROSECUTION DEEMED NONDISCHARGEABLE.

On August 24, 2007 in its Memorandum Decision (**Appendix, Volume One at 235**) at item E. "Summary Judgment as to the Malicious Prosecution Action" the Bankruptcy Court ruled as follows:

> "In a (sic) action commenced October 17, 2003 in the Sacramento County Superior Court, Case No. 03AS05820, the Plaintiffs seek damages for malicious prosecution against the Debtor and the attorneys who represented her in the state court action. The complaint appears in the Plaintiffs' Exhibits filed May 22, 2007, Ex. L. The damages sought include the attorney's fees and costs the Plaintiffs incurred in defending against the Debtor's claims, damages for lost earnings, damages for injury to their reputations, social standings, and character, damages for emotional distress, and punitive damages.
>
> In the Motion, the Plaintiffs seek 'an order determining that any debt resulting from the malicious prosecution litigation' is nondischargeable. Motion at 9. No such relief was prayed for in Plaintiffs' complaint; indeed, the malicious

> prosecution action was not even mentioned. For this reason, the court will deny the Plaintiffs' request for an order determining that any debt resulting from that action is nondischargeable." (**Appendix, Volume One at 250 to 251**)

The Creditors did not appeal this order. How then can the District Court rely on malicious prosecution to except the identical debt from discharge when the Bankruptcy Court expressly denied the relief?

B. THE DISTRICT COURT IS THE ONLY ENTITY TO RELY ON MALICIOUS PROSECUTION AS THE BASIS FOR A DETERMINATION THAT THE DEBT IS NONDISCHARGEABLE

The record supports the conclusion that the District Court is the only entity which believes that malicious prosecution supports the determination that the debt is nondischargeable.

The bankruptcy judge, on June 20, 2007, noted that if the issues were bound up in malicious prosecution, then summary judgment would be inappropriate because the claim and issues had not been litigated and were pending in a separate state court action. **Appendix, Volume Four at 2080: line 23 to 2083 line 25** and at **Appendix, Volume Four at 2102: lines 7 through 18.**

Creditors, although originally acknowledging that the basis for the claim was malicious prosecution (**Appendix, Volume Four at 2092: lines 14-16** .), have since disavowed that malicious prosecution is the basis for the debt being nondischargeable; but rather

that the debt simply stemmed from an attorney fee award pursuant to Government Code § 12965. **Appellees' Opening Brief at p. 6, line 27 through p. 7, line 3.** This reversal, of course, was necessitated as a result of the clear and unmistakable facts that 1) the malicious prosecution claim was then pending in the state court complaint (**Appendix, Volume One at 263**) and 2) the state court in the FEHA case could not have adjudicated the malicious prosecution claim because of a lack of jurisdictional competency, [4] and 3) the Bankruptcy Court judge had already denied Creditors' motion for summary judgment based on the concept of malicious prosecution.[5]

Finally, Debtor has always maintained that malicious prosecution could not possibly form the basis for either claim or issue preclusion in that malicious prosecution had never been litigated (issue preclusion) and Creditors could not point to a favorable decision on the claim/cause of action for malicious prosecution (claim preclusion). The bankruptcy judge agreed.

This leaves the District Court with the dubious distinction of creating the analysis which has been rejected by the parties and the lower court and with no citation to the record to support the assertion.

The long and short of this is that until August 4, 2008, malicious prosecution could not possibly have

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4 It is a factual and legal impossibility for a court to simultaneously adjudicate a malicious prosecution claim with a case in chief.

5 As set forth above at **Appendix, Volume One, page 235.**

played any part in determining whether the debt was nondischargeable under either claim or issue preclusion.

C. THE STATE COURT OF APPEALS NEVER CONSIDERED WHETHER MALICIOUS PROSECUTION HAD BEEN LITIGATED IN THE UNDERLYING STATE COURT CASE.

For some inexplicable reason, the District Court erroneously concludes that the issues relating to nondischargeability of the debt were somehow, for the first time, litigated in the state court of appeals.

First, on June 20, 2007, in response to Debtor's argument to the bankruptcy court that the discussion of the state court judge in his "Order Disposing of Motions Related to Costs and Attorney's Fees" **(Appendix, Volume Two at 454)** could not support a finding of nondischargeability, Creditors' counsel made the patently false statement to the bankruptcy judge that " it was specifically appealed that she [Debtor] was addressing the issue of malicious prosecution of the case on appeal." **Appendix, Volume Four at 2101: lines 13-22.** This statement is false, was false, and was known by Creditors' counsel to be false at the time it was made. To date Creditors' counsel has failed to identify any part of the court of appeals opinion which address[ed] the issue of malicious prosecution". In fact, none of the following words appear anywhere in the opinion: *willfull, willful, wilfull, malice, malicious, hurt, harm* or *tortious.* The word "tort" does appear in page 26 of the opinion **(Appendix, Volume One at 293)** but it was contained in the Court's discussion of the assault Creditor Arnold committed upon the Debtor.

Secondly, the bankruptcy judge, expressly found "there's (sic) simply insufficient specific findings in the state court for the prior proceeding that doesn' t (sic) constitute claim preclusion or collateral estoppel" with regard to malicious prosecution **(Appendix, Volume Four at 2102: lines 15-18)** and shared with the parties the court's view that the state court order itself"containing that discussion section at first glance to me seems insufficient for using as a sole basis findings for a malicious prosecution action . . ." because the motion seeking attorneys fees was based upon "meritless, groundless claims" rather than malicious prosecution. **Appendix, Volume Four at 2102: line23 through 2103: line 6.** As set forth above, the Bankruptcy Court judge went on to deny Creditors' motion for summary judgment based on the concept of malicious prosecution.

Thirdly, the bankruptcy court offered to review the appellate decision again. Had the court done as promised, that review would reveal that nowhere in the appellate decision is there any mention of a claim of malicious prosecution, nor any of the words offered above.

D. NEW EVIDENCE

As the District Court is aware from its review of the record, subsequent to the decision rendered by the California State Court Third District Court of Appeals, Creditors on October 17, 2003 filed and thereafter pursued a malicious prosecution action against Debtor. **Appendix, Volume One at 263.** The District Court is also aware from its review of the record, that Creditors alleged in that complaint that Debtor "acted maliciously in bringing and prosecuting the lawsuit

against plaintiffs herein and with a willful and conscious disregard for the rights of [Creditors]." **Appendix, Volume Four at 265: line 28 through 266: line 2.** In other words, the conduct which the District Court found *had previously been* litigated in the FEHA case through the attorney fee award motion and thereafter on Appeal in the Third District *was actually pending* in a real state court action for malicious prosecution.

The new evidence is that on August 4, 2008, Creditors dismissed, with prejudice, the entire malicious prosecution action against Debtor. Declaration of Melanie Rieger Hughes, **Exhibit A.**

A dismissal, with prejudice, operates as a favorable determination for purposes of claim preclusion and issue preclusion. *Boeken v. Philip Morris USA, Inc.*, (2008) 159 Cal.App.4th 139, 72 Cal.Rptr.3d. In other words, the Dismissal is determinative on the claim of malicious prosecution. This is the second favorable final determination on the issue of malice Debtor has obtained against Creditors. The first being the verdict of the jury in the underlying action and the second being the instant dismissal of the complaint for malicious prosecution.

Now this Court must apply claim preclusion and enter an order that to the extent that malicious prosecution forms the basis for the intentional tort upon which an exception to discharge under Section 523 (a) (6) arises, the only order that is available is one favorable to Debtor.

III

THE DISTRICT COURT MISAPPLIED COLLATERAL ESTOPPEL TO ACHIEVE THE ERRONEOUS RESULT

Proper application of collateral estoppel (issue preclusion) requires, *inter alia*, that 1) the issue to be precluded must be IDENTICAL to that decided in a former proceeding; 2) the issue must have been ACTUALLY litigated; and 3) the issue must have been NECESSARILY decided in the former proceeding. *Lucido v. Superior Court*, 51 Cal.3d 335 (1990). The District Court's "analysis" fails in all respects to identify the "issue" in this case that is identical to that decided in the former proceeding, fails to identify when and how it was actually litigated, and finally, fails to demonstrate that the "issue" in this case was necessarily decided in the former case. Again, it is not unfair to ask the Court to be clear and specific.

Initially, it should be noted that while the District Court states that it "disagrees" with Debtor's analysis of the criteria, the District Court fails in all respects to identify in the record any document that supports it conclusion. In fact, the District Court fails completely to cite to any document in the record to support its analysis.

It should also be noted that the burden is on Creditors to bring to the court the record to support their claims of issue preclusion. "The party asserting preclusion bears the burden of showing with *clarity* and *certainty* what was determined by the prior judgment." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992). *(emphasis added).*

A. THE DISTRICT COURT FAILED TO IDENTIFY THE ISSUE IN THIS CASE THAT IS IDENTICAL TO ANY ISSUE THAT WAS NECESSARILY DECIDED IN THE STATE COURT PROCEEDING.

The District Court is required to identify what factual allegations are identical between this case and the state court action. "The 'identical issue' requirement addresses whether ' identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *(Sims, supra*, 32 Cal.3d at p. 485, 186 Cal. Rptr. 77, 651 P.2d 321)" *Lucido, supra* at. 342. The District Court ignored this requirement and it is apparent that the District Court only concerned itself with "the ultimate issues" and the disposition.

Nowhere in any of the pleadings or other papers, or in the record before the state court, are any "factual allegations" identified which are identical to the factual allegations of the adversary complaint. In fact, the allegations of the moving papers regarding the attorney fee award nowhere mention, indicate, or claim that Debtor acted wilfully, maliciously, or with any intent to harm Creditors.

As the first step in this process, the District Court should have at least identified the "issues" in this case which are identical to the issues decided in the state court attorney fee award order. In footnote 4 of its Order, the District Court provides its analysis of the elements of the intentional tort of malicious prosecution and the District Court's conclusion, apparently, that "the record indicates that [Debtor] commenced the underlying action and it was pursued to a legal termination favorable to [Creditors] . . . " While the District Court made it clear that Debtor's conduct rose to the level of malicious prosecution and the issues which are relevant in this action were somehow decided in the state court as malicious prosecution. This

analysis is of course impossible.

First, the District Court completely missed the mark with its analysis of malicious prosecution. See above. Second, exactly where in the record is there any support for the proposition that the issue of "willful and malicious" was litigated in the state court proceeding? The District Court does not provide any citation to the record. The record is devoid of any such identification of issues which were "actu ally litigated".

It is pure sophistry to claim that the state court findings should be given preclusive effect. The Court is required to review more than the mere order or judgment to determine what was litigated. Neither this court nor the bankruptcy court took the time to review the record that was before the state court. This may be because the only record provided was from Debtor. The burden is on Creditors to present a full and complete record. *Clark v. Bear Stearns & Co., Inc., supra* at 966 F.2d 1318.

It is requested that the District Court identify, with sufficient clarity so that the Ninth Circuit is not constrained to remand to the District Court for clarification, exactly what issues are involved in this case that were actually litigated and decided in the state court case and where in the state court record these issues are identified. If all this Court has is the "malicious prosecution" theory, please so state.

B. WHAT ISSUES WERE ACTUALLY LITIGATED IN THE STATE COURT ACTION?

Again, without any citation to the record, the District Court concludes that Debtor's conduct, alleged to have been both "willful and malicious", was actually litigated in the state court. It is requested

that the District Court cite to the record wherein there were *any* allegations which claimed that Debtor's conduct was malicious and/or willful and not concluded in Debtor' s favor. If this Court is unable to find a sufficient record (transcripts, pleadings, jury instructions, jury verdict, etc.) that fault lies with the Creditors.

With specificity, please identify where the issues in this case were raised. Even the state court judge disagrees with the District Court's analysis. The order on attorney fees correctly identifies the basis of the attorney fee award as required by the statute ("frivolous, unreasonable and without foundation"). **Appendix, Volume Two at 456: line 1.** The state court judge then launches into his extra judicial diatribe which begins "[t]his is the most benign assessment that can be made of Rieger's claim. It was also brought in bad faith and with the claimant's declared objective 'to bring Clay down '." Emphasis added. **Appendix, Volume Two at 456: lines 1 through 3.** These observations by the state court judge are not based upon any identifiable evidence in the record. The "pleadings" do not raise these claims and no evidence is cited by Creditors in the state court papers to support the state court judge. Where are the transcripts which would support the state court judge' s diatribe? Where are the supporting documents which were offered as evidence? Where is there anything other than the statements of the state court judge? They are non-existent in this record . This Court is REQUIRED to look behind the order and judgment before it pronounces its decision to apply collateral estoppel.

It is respectfully requested that this Court identify with specificity what transcript, pleading, or other document which was before the state court judge which identified the issues of "willful and malicious" conduct, that argued that the conduct was anything other than frivolous, unreasonable and without foundation, or reverse this order. Debtor is confident that no such documents can be found because Creditors did not provide any transcripts or pleadings which could ever support the District Court's order.

IV

OTHER MATTERS

In its Order at page 10: line 12, the District Court states, as a fact, "Appellant [Debtor] violated Government Code Section 12965(b)". It is requested that the District Court explain how one would "violate" Section 12965(b).

At page 14: lines 5 - 6 of the Order, the District Court states "[Debtor] appealed the attorney's fee award, and thus had a 'full and fair' opportunity to litigate this issue." What "issue" is this statement referring to? Is it referring to the issue of "willful and malicious" conduct? If so, in addition to the District Court directing the parties' attention to any where in the attorney fee motion, opposition and reply documents located in **Appendix, Volume Three at 1221 through 1257** the District Court should also direct the parties' attention to any where in the Third District Court of Appeals' Opinion where the words "willful" or "malicious" are even mentioned. The Third DCA opinion is located in **Appendix, Volume One at 268.** If the "is sue" is not whether Debtor acted wilfully and/or maliciously, the "issue" cannot be relevant to

this suit.

The District Court pays lip service to the application of collateral estoppel. However, isn't it true that the District Court , just as did the bankruptcy judge, applied claim preclusion in that the entire §523(a)(6) claim was "found" to have been litigated in the state court proceeding on whether to award attorney's fees or not? In other words, what issues or claims were not decided by the state court judge? If all issues were decided, then the District Court needs to say so and then analyze this case in the context of claim preclusion.

CONCLUSION

It is respectfully requested that the Court grant a rehearing on the above issues and enter an order that is consistent with the law (*Geiger, Kawaauhau*, and *Ditto)*, its mandates (requirement of commission of an intentional tort) and the record in this case.

Dated: August 20, 2008

Respectfully submitted,

/s/ Melanie Rieger Hughes
MELANIE RIEGER HUGHES
Debtor, in pro per

*****

DECLARATION OF MELANIE RIEGER HUGHES IN SUPPORT OF MOTION FOR REHEARING; MEMORANDUM OF POINTS AND AUTHORITIES

I, MELANIE RIEGER HUGHES, declare as follows that:

1. I am the debtor/defendant/appellant in this matter. I have personal knowledge of the facts set forth below and, if called upon to do so, could and would testify competently thereto under oath.

2. I have personal knowledge of the facts set forth below and, if called upon to do so, could and would testify competently thereto under oath.

3. Attached hereto and incorporated herein by reference as **Exhibit A** [6] is a true and correct copy of the Request for Dismissal filed by Creditors in the Malicious Prosecution action they brought against me.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Sacramento, California.

Date: August 20, 2008

/s/ Melanie Rieger Hughes
MELANIE RIEGER HUGHES

---

6 For purposes of this Petition, Exhibit A can be found at EOR p. 3078.

(EOR at pp. 3055 to 3059)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

District Court Case Number
2:08CV-00490 JAM

Bankruptcy Court Case Number
No. 05-22777-D-7

Adversary Proceeding Number
No. 05-2225-004

MELANIE HUGHES

Appellant.

v.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION

Appellees.

DATE: October 1, 2008
TIME: 9:00 a.m.
CTRM: Courtroom 6, 14th Floor

Attorney for Appellees
Clayeo C. Arnold and
Clayeo C. Arnold, Professional Law Corporation
HUGHES & PRITCHARD, LLP
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OPPOSITION TO APPELLANT'S MOTION FOR REHEARING

CLAYEO C. ARNOLD ("Arnold") and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION, ("PLC"), (collectively "Appellees"), by and through counsel, Hughes & Pritchard, LLP hereby oppose Appellant's Motion for Rehearing on the following grounds:

A. Standard for Rearing.

"A petition for rehearing was not designed to be a 'crutch for dilatory counsel, nor in the absence of demonstrable mistake, to permit reargument of the same matters.'" *Olson v. United States*, 162 B.R. 831, 834 (D.Neb. 1993) (quoting *United States v. Vasquez*, 985 F.2d 491, 497, (10th Cir. 1993)). "'Whether or not to grant reconsideration is committed to the sound discretion of the court.'" *United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1214 (9th Cir. 2005) (quoting *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003)).

According to the Ninth Circuit in *Armster v. United States Dist. Court Cent. Dist.*, 806 F.2d 1347, 1356 (9th Cir. 1986):

> Petitions for rehearing are governed by Fed. R. App. P. 40. "A properly drawn petition for rehearing serves a very limited purpose." *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962) (adopting standard later codified in Fed. R. App. P. 40). The petition must state "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R. App. P. 40(a). The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision. A party "abuse[s] . . . the privilege of making such a petition" when it seeks review of a scope greater than the limited confines of Fed. R. App. P. 40. See *Anderson*, 300 F.2d at 297. A panel is simply not capable of having overlooked or misapprehended "points of . . . fact" occurring subsequent to its initial decision. Consideration of subsequent factual occurrences is , thus, beyond the scope of a petition for rehearing.

In *Fowler*, the Ninth Circuit explicitly held that the standards of Fed.R.App.P. 40 were appropriately applied to a motion for rehearing under Fed.R.Bankr.P.

8015. 394 F.3d at 1214-15. Thus, the only basis for Appellant' s motion can be that this Court did not properly consider all relevant information in making its decisions.

B. The Court's Decision Was Correct on the Merits.

A. *The District Court properly applied 11 U.S.C. § 523(a)(6).*

Appellant repeats her argument that pursuant to *Geiger v. Kawaauhau* 113 F.3d 848 (8th Cir. 1997) and subsequent decisions, a non-dischargeable debt must be based upon the commission of an intentional tort or intentionally tortious conduct. This Court has already considered the argument and rejected it:

"Appellant maintains that the bankruptcy court erred in reaching this conclusion because non-dischargeable debt under § 523(a)(6) is confined to debt arising out of an intentional tort. The Court disagrees. Nondischargeable debt under § 523(a)(6) is not limited to debt arising out of an intentional tort; rather, § 523(a)(6) excepts from discharge any debt for 'willful and malicious injury by the debtor' See eg., In re Jerchich, 238 F.3d at 1208-09. . . ." *Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order*, page 9, lines 7-15.

In addition, this Court found that Appellant's conduct resulting in the attorney fee award was in fact tortious. "In this Court's opinion, the state court's factual findings are sufficient to show that Appellant's conduct in initiating and prosecuting her sexual harassment claim constituted tortious conduct, resulting in willful and malicious injury." *Order Denying Appeal and Affirming Bankruptcy Court's Partial*

Summary Judgment Order, page 10, line 20 - page 11, line 1.

Appellant has presented nothing that would justify a modification of these rulings. This Court clearly considered the issue, and rule (sic) against Appellant. The Court having ruled, after considering the arguments and authorities, there is no basis for rehearing.

Appellant might have argued that the Ninth Circuit's recent decision in *Lockerby v. Sierra*, - F.3d - (9th Cir. August 7, 2008) (2008 App. Lexis 16645) suggest a different result. In that case, the Ninth Circuit held that willful and malicious injury, for purposes of § 523(a)(6), must be tortious, rather than a breach of contract. The case turned on whether a breach of contract could qualify as a "willfu l and malicious" injury, but the Court's decision makes it clear that the act in question must be a tort under state law. Fortunately, this Court's decision presciently dealt with this point, in footnote 4:

> An action for the tort of malicious prosecution lies where a prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probably (sic) cause; and (3) was initiated with malice. Soukop v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 292 (2006). Here, the record indicated that Appellant commenced the underlying action and it was pursued to a legal termination favorable to Appellees.

> The record also indicates that Appellant commenced the underlying action unreasonably for the improper purpose of causing harm. Accordingly, the court finds that the record contains sufficient evidence demonstrating the Appellant engaged in tortious conduct.

Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order, page 11, n.4, lines 22-28. In other words, to the extent that a tort under state law is required in order to satisfy § 523(a)(6), the facts here are sufficient to demonstrate the tort of malicious prosecution.

Interestingly, the Ninth Circuit in *Lockerby* did not hold that the tortious conduct required for § 523(a)(6) had to be an intentional tort - only that it had to be a tort under state law. One would think that if the statute requires an "inten tional tort," the Ninth Circuit would have mentioned that fact in the course of analyzing the nature of the conduct necessary to satisfy § 523(a)(6).

Appellees will not waste the Court's time by repeating their arguments, contained in their brief, in response to Appellant's arguments on the "intentional tort" point. Appellees hereby incorporate by reference their response to the "intentional tort" argument, contained in their brief.

B. *The District Court correctly applied the doctrine of collateral estoppel.*

Appellant rehashes her collateral estoppel argument, contending that the issues litigated in the state court were not identical to the issue of

nondischargeability. Again, this Court considered the argument and rejected it:

"The propriety of Appellant's conduct in pursuing her sexual harassment claim was squarely before the state court on Appellees' motion for attorney's fees under § 12965(b), which required the court to determine whether Appellant's conduct was unreasonable, frivolous, meritless, vexatious or in bad faith." *Order Denying Appeal and Affirming Bankruptcy Court's Partial Summary Judgment Order*, page 13, lines 22-28. Again, Appellant has presented nothing to justify a modification of this decision.

Appellees will not waste the Court's time by repeating their arguments, contained in their brief, in response to Appellant's arguments on the issue of "collateral estoppel." Appellees hereby incorporate by reference their response to Appellant's collateral estoppel arguments, contained in their brief.

C. Appellant Presents No New Relevant Evidence

Appellant also argues that "new evidence" of the dismissal, on August 4, 2008, of a malicious prosecution action brought by Appellees against Appellant, somehow justifies a different result in her appeal, or that the dismissal acts as some sort of claim preclusion for the § 523(a)(6) action. As noted above (p.2: lines 11-13, *supra*), a petition for rehearing is not a mechanism to consider newly discovered evidence.

Moreover, the settlement or dismissal of the recent malicious prosecution action is irrelevant. The key event is the Superior Court's determination-in 2000-that Appellant's action was brought with "a malicious desire to harm Arnold" (Appendix, p. 456), and that the standards for an award of attorneys fees

under Government Code § 12965(b) had been satisfied. The bankruptcy court applied collateral estoppel to the award of attorneys fees on the basis of that happened in 1999 and 2000, and this Court affirmed that decision. The resolution of a subsequent malicious prosecution action is simply not germane to the issue of whether the original state court judgment should be given collateral estoppel effect. Nothing with respect to the dismissal of the recent malicious prosecution action can have any effect on what the state court decided in connection with the original lawsuit.

D. Appellees' Response to this Motion is Timely.

Appellant has suggested that Appellees' opposition is untimely, based on Fed.R.Bankr.P. 8011, because it was not filed within seven days after the filing of motion. However, Rule 8011(c) provides that "all motions shall be decided without oral argument, unless the court orders otherwise.' Appellant set this motion for hearing on October 1, 2008, in accordance with this Court's local rules, and in complete derogation of Rule 8011(c).

Local Rule 78-230(c) permits opposition to a noticed motion to be filed not less than 14 days preceding the hearing date. Based on a hearing date of October 1, 2008, the opposition is due on September 17, 2008, and is being filed on that date. Accordingly, on the basis of Appellant's decision to proceed according to this Court's local rules and practices, rather than filing a motion for which no hearing would be scheduled absent court order, Appellees'opposition is timely.

E. CONCLUSION

For the foregoing reasons, Appellant's motion should be denied.

DATED: September 17, 2008

HUGHES & PRITCHARD, LLP

/s/ Gregory J. Hughes
Gregory J. Hughes
Attorney for Appellees

(EOR at pp. 3041 to 3054)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

District Court Case Number
CIV: 2:08CV-00490 JAM

Bankruptcy Court Case Number
NO. 05-22777-D-7

Adversary Proceeding Number
NO. 05-2225-D

In re
MELANIE HUGHES

Appellant and Debtor.

CLAYEO C. ARNOLD and CLAYEO ARNOLD, PROFESSIONAL LAW CORPORATION

Appellees and Plaintiffs,

v.

MELANIE HUGHES,

Appellant and Defendant.

Date: October 1, 2008
Time: 9:00 a.m.
Dept: Courtroom 6, 14th Floor

Attorney for Appellant
Melanie Hughes
2150 Capitol Avenue, Suite 100
Sacramento, CA 95816
Telephone: (916) 444-7704
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APPELLANT'S REPLY RE MOTION FOR REHEARING

INTRODUCTION

Appellee Clayeo C. Arnold (Arnold) and Clayeo C. Arnold, Professional Law Corporation PLC/Corporation) (collectively "Appellees") fail to understand the following:

1. The holding and application of *United States v. Fowler (In re Fowler)*, 394 F.3d 1208 (9th Cir. 2005);
2. The nature and application of the doctrine of *stare decisis* as it applies to *Geiger v. Kawaauhau*, 113 F.3d 848 (8th Cir. 1997) and *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998);
3. What the Ninth Circuit meant when it stated"the Supreme Court clarified that the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'" *Ditto v. McCurdy*, 510 F.3d 1070, 1076 (9th Cir. 2007);
4. No tort exists with elements of 1) "a malicious desire to harm Arnold" and 2) the standards for an award of attorneys fees under California Government

Code § 12965(b), and if such a tort exists, it does not translate into "a malicious desire to harm the PLC/-Corporation";

5. The dismissal of the state malicious prosecution action, with prejudice, by Appellees is not only relevant, it is binding on the parties and is a judgment on the merits between the plaintiffs and the dismissed defendant;

6. The failure of the record to support the conclusions by this court renders the Order inadequate. Appellant requested that the court provide some citations to the record to support its apparent findings and conclusions. Appellees have ignored this request and failed to provide any record citations to support the order;

7. This court's truncated use of *Kawaauhau*, i.e. that "[a]n injury is 'willful' under Section 523(a)(6) if the debtor intends the consequences of his action" [1] completely ignores the precursor expressly announced by the Eighth Circuit and affirmed by the Supreme Court that "**for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commission of an intentional tort.** We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'." Emphasis added. *Geiger* 113 F.3d at 853; and

8. The doctrine of collateral estoppel could not be applied to the Second Cause of Action in the Adversary Proceeding.

In addition to the above, Appellees' counsel intentionally misrepresents Appellant's position to

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1 Order Denying Appeal at page 7: lines 6-7.

this court on several issues including the following:
1. Appellees' counsel states that "Appellant repeats her argument that ... a non-dischargeable debt must be based upon the commission of ... intentionally tortious conduct." **Appellees Opposition at 2: lines 19-21.** **Appellant has never taken this position**. Appellant' position is now and always has been that "the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'" Stated slightly differently, **"for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commission of an intentional tort.** We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'." *Geiger* 113 F.3d at 853. Intentionally tortious conduct does not equate to "intentional tort". The phrase "intention ally tortious conduct" does not describe any standard that can be attributed to Appellant, EVER. If this court and Appellees are unable to provide a name to the underlying tort in this case, the debt is dischargeable.
2. Appellees' counsel states that "Appellant rehashes her collateral estoppel argument, contending that the issues litigated in the state court were not identical to the issue of nondischargeability." **Appellees' Opposition at 4: lines 5-7.** Whether this is only sloppy writing or intentional misrepresentation is unknown. However, Appellant has never made the argument attributed to her. Appellant's argument is that for collateral estoppel to apply, the issue to be barred from relitigation must be identical to an issue actually litigated and decided in the prior proceeding in a

different cause of action.[2] Nowhere in any of Appellant's filings with this court will Appellees be able to point to any statement by Appellant that the "issue of nondischargeability" is an issue.

Whether a debt is nondischargeable is a **claim,** i.e. cause of action, not an **issue.**[3] The issues which make up the claim have been identified by the authorities above as 1) an intentional tort, 2) willful injury/-conduct, 3) malicious injury/conduct, and 4) to the person or property of another. As stated by the Eighth Circuit and expressly affirmed by the United States Supreme Court, "we hold only that **for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commission of an intentional tort.** We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'." *Geiger*, 113 F.3d at 853. The Eighth Circuit went on to note that while there may be an intentional tort, i.e. conversion, that does not necessarily mean that the conduct was willful. Thus, there are at least the four elements described above. Appellant

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2 If the issue were decided in the same cause of action in the prior litigation the court would apply claim preclusion, not issue preclusion.

3 The court need only review the adversary complaint in this action. The cause of action in the First and Second causes of action are for nondischargeabliity of the debts. Appellant has carefully avoided confusing, for purposes of *res judicata*, what constitutes a cause of action (claim) and what constitutes an issue for collateral estoppel purposes. This court recognized this fact in footnote 2 of its Order.

has been consistent throughout this litigation in her position.

IN RE FOWLER DOES NOT ESTABLISH A STANDARD TO BE APPLIED TO MOTIONS FOR REHEARING UNDER FRBP 8015

Appellees take the unfounded position that there is one standard applied to motions for rehearing which was announced in *In re Fowler* . Appellees' counsel states that "[i]n Fowler, the Ninth Circuit explicitly held that the standards of Fed.R.App.P. 40 were appropriately applied to a motion for rehearing under Fed.R.Bankr.P. 8015." **Appellees' Opposition at 2: lines 13-14.** Appellees' counsel, from this pronouncement, claims that "the only basis for Appellant's motion can be that this Court did not properly consider all relevant information in making its decision." ***Id.*, lines 14-16**. This conclusion, at best, is misleading. The Ninth Circuit DID NOT decide what standard, if any, was applicable to all motions for rehearing under Rule 8015. The Ninth Circuit expressly noted that there are many standards that CAN be applied and in the context of *In re Fowler* it was not an abuse of discretion for that court to apply that standard. As noted by the Ninth Circuit, Rule 8015 does not set forth a standard and it was not an abuse of discretion to apply F.R.A.P. 40.

THIS COURT WILL ABUSE ITS DISCRETION IF IT IGNORES THE DISMISSAL WITH PREJUDICE OF THE MALICIOUS PROSECUTION ACTION ON AUGUST 4, 2008 OR CONTINUES TO RELY ON MALICIOUS PROSECUTION WITHOUT DISMISSING APPELLEES' CLAIMS

The apparent reason Appellees' counsel mislead the court as to the "holding" of *In re Fowler* is because if this court considers the dismissal, with prejudice, of the state court malicious prosecution action on August 4, 2008, this court will either find the debt dischargeable or come up with another intentional tort to support the Order.

It is established in *In re Fowler* that another appropriate standard applied to a rehearing motion under Rule 8015 is found in *The Shawnee State Bank v. First Nat'l Bank of Olathe (In re Winders)*, 202 B.R. 512, 517, wherein the four part test included "(1) the Court has patently misunderstood a party, (2) the court has made a decision outside the adversarial issues ... presented by the parties, (3) the court has made an error not of reasoning but of apprehension, or (4) there is a controlling or significant change in the law or facts since the submission of the issue to the Court." Application of at least two parts of this standard are entirely appropriate. First, there is indeed "a controlling [and] significant change in the ... facts since the submission of the issue to the Court." The dismissal with prejudice, on August 4, 2008, of Appellees' malicious prosecution action against Appellant, requires that this court reevaluate its decision that malicious prosecution somehow is the tort upon which

the exception from discharge under Section 523(a)(6) is based. The bankruptcy judge refused to find, either as a matter of law or fact, that malicious prosecution had been litigated.[4] Now that 1) malicious prosecution has been decided, 2) a dismissal with prejudice bars a subsequent action on the same claim between the parties and their privies, and 3) a dismissal with prejudice is a judgment on the merits between the plaintiff and the dismissed defendant, it is clear that to the extent this court wants to rely on malicious prosecution, *res judicata* bars any determination other than Appellant wins on the claim and malicious prosecution can no longer be considered in this action other than to grant judgment for Appellant.

A second reason to grant a rehearing is that this court came up with a conclusion that is outside the adversarial issues presented by the parties. Appellees' counsel have proclaimed that they "have never contended that the Superior Court decided a malicious prosecution action against Appellant". **Appellees' Opening Brief at 6: lines 27-28.** Appellees further proclaimed that they "have never contended ... that the Superior Court resolved any issues relating to dischargeability." ***Id.* at line 28.** [5] To further under

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4 **Appellant's Appendix at 2092, lines 12-16**;"there needs to be a trial to determine whether that claim of malicious prosecution is meritorious"at **2093, lines 14 - 16,** "so that claim needs to be litigated"; at **2094 lines 10-11**.

5 This admission is interesting because if none of the issues relating to dischargeability were resolved in the state court proceeding, how did this court apply collateral estoppel to bar

mine this court's analysis that malicious prosecution or the issues necessary to support a malicious prosecution claim somehow were actually litigated in the original state court action, Appellees' proclaimed that the "Superior Court ruled that Appellants were entitled to attorneys fees under Government Code Section 12965, and in so ruling, necessarily decided that the grounds required for such a ruling had been satisfied. The Superior Court did nothing else germane to the present action." (Emphasis added) ***Id.* at page 7: lines 1-3.** Appellant for her part has steadfastly maintained that malicious prosecution could not form the underlying intentional tort for purposes of Section 523(a)(6) because 1) the original state court had no jurisdiction to entertain the claim, 2) the claim and the issues subsumed therein had never been litigated, and 3) the malicious prosecution claim was pending in a state court action between the identical parties.

Given that Appellees denied that the state court took any action that could be construed as litigating any issues involved in malicious prosecution, Appellant has always maintained that malicious prosecution and its issues have never been litigated, and the bankruptcy judge noted that malicious prosecution had not been litigated, it is wondered how this court reached its conclusion in selecting the underlying tort.

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litigation of the various issues bound up in a 523(a)(6) claim?

APPELLEES' DISMISSAL WITH PREJUDICE OF THE MALICIOUS PROSECUTION ACTION AGAINST APPELLANT ACTS AS A BAR TO ANY FURTHER ACTION ON THE SAME CAUSE OF ACTION

The following facts cannot be disputed by Appellees:
1. Appellees filed a malicious prosecution action against Appellant on October 14, 2003; **Appendix at 263;**
2. The only cause of action/claim alleged in the malicious prosecution action was for malicious prosecution; *Id.*
3. The malicious prosecution claim was based upon identical allegations found in the adversary proceeding in this action. Compare the Adversary Complaint, Paragraph 12 (**Appendix at 93**), " the claims and continued pursuit of the claims by the Debtor were done with a malicious desire to harm Arnold" with the Malicious Prosecution complaint, Paragraph 17 "it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold." **Appendix at 267.**
4. The bankruptcy judge in this case stated that the malicious prosecution claim had not been litigated, denied Appellees any relief based upon the pending state malicious prosecution action, and did not base his order on the theory that malicious prosecution was the underlying intentional tort; [6]

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6 The only mention of malicious prosecution is in the bankruptcy judge's denial of relief to Appellees based upon the pending state court malicious prosecution action. Suffice it to say

5. On August 4, 2008, Appellees herein dismissed, with prejudice, the state malicious prosecution action against Appellant herein;
6. This court has hung its hat on the tort of malicious prosecution.

This is a simple application of *res judicata*. Does the dismissal with prejudice of the malicious prosecution action bar any further action on a claim of malicious prosecution? The answer is yes.

The rule to be applied in this case is that "[i]t is well settled that a *retraxit* is equivalent to a judgment on the merits, which bars a subsequent action for the same cause." "' *Retraxit*' is the common law term for a voluntary dismissal with prejudice, including one entered in open court pursuant to a stipulation. *Gagnon Co., Inc. v. Nevada Desert Inn* , (1955) 45 Cal.2d 448, 455. Thus, a dismissal with prejudice, invoking the principles of *res judicata*, will resolve what claims or issues are barred as a result of the *retraxit*.

In this case, the bankruptcy judge, Appellees and this court have all avoided the tort issue in an effort to find the debt nondischargeable. This court identifying malicious prosecution was fortuitous for Appellant because now that *res judicata* principles apply through the *retraxit*, the case has been simplified. This court has no option but to apply *res judicata* to the first and second causes of action of the adversary proceeding. Since the underlying order is one for summary judgment, meaning that there are no mate-

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that Appellant was surprised that this court went to malicious prosecution as the underlying tort.

rial issues of fact in dispute, and since this court has identified malicious prosecution as the underlying tort, the only result that can be forthcoming is that the tort alleged in the adversary proceeding is malicious prosecution and until August 4, 2008, it had not been decided, but as of August 4, 2008, the dismissal with prejudice constituted a decision on the merits invoking the principles of *res judicata*. The causes of action and the issues decided in the malicious prosecution action appear on the face of the malicious prosecution complaint and this court is not free to avoid the legal consequences of the decision on the merits. The first and second causes of action of the adversarial proceeding must be dismissed.

IF MALICIOUS PROSECUTION IS ABANDONED AS THE NECESSARY INTENTIONAL TORT WHAT TORT IS THE COURT RELYING ON TO EXCLUDE THE DEBT FROM DISCHARGE PURSUANT TO SECTION 523(a)(6)?

Once again, Appellee's counsel are silent when it comes to discussing the HOLDINGS of Supreme Court, Ninth Circuit, and Eighth Circuit cases which are BINDING on this court. This court's order is clearly and demonstrably wrong.

No one can deny that this court took the position that it disagrees with the notion that **"for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], it is necessary that it be based on the commis-**

sion of an intentional tort." [7] This court repeated the issue and simply stated "the Court disagrees." This court has not been vested with the prerogative of disagreeing with the holdings of the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Eighth Circuit Court of Appeals. That prerogative is vested in the United States Supreme Court. Once a RULE OF LAW is announced by the United States Supreme Court, ALL courts of the land are REQUIRED to follow that rule unless or until the United States Supreme Court changes the rule. For the convenience of this court, which has expressed a desire to disagree with the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Eighth Circuit Court of Appeals, with regard to the RULE concerning the underlying basis for excluding a debt from discharge pursuant to Section 523(a)(6), Appellant will once again repeat *verbatim* the rule which Appellee's counsel refuse to discuss head on and this court "disagrees" with.

The final resolution of the issue began with the case of *Geiger v. Kawaauhau*, 113 F.3d 848 (8 th Cir. 1997) wherein the Court stated in clear and unambiguous language, not subject to interpretation by this court, that:

> "we hold only that **for a judgment debt to be nondischargeable under the relevant statutory provision [Section**

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7 This court so stated in its Order at page 9, lines 7-14. The quoted language is from *Geiger v. Kawaauhau*, 113 F.3d 848, 853 (8th Cir. 1997).

> **523(a)(6)], it is necessary that it be based on the commission of an intentional tort.** We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'." **Emphasis added.** *Geiger* 113 F.3d at 853.

The *Geiger* Court identified the rule as follows:

> "the correct rule is that a judgment debt cannot be exempt from discharge in bankruptcy unless it is based on what the law has for generations called an intentional tort, a legal category that is based on 'the consequences of an act rather than the act itself'. *Geiger* at 113 F.3d at 852.

Appellant is of the opinion that the above language does not need any interpretation: There is no ambiguity, it is clear, and it is concise. Given this court's disagreement with the holding, Appellant will point out that the Eighth Circuit HELD that the CORRECT RULE is that you must have an intentional tort underlying the debt OR "the debtor's conduct cannot otherwise be said to be 'willful'."

The Eighth Circuit's decision was reviewed by the United States Supreme Court, in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998). The United States Supreme Court *EXPRESSLY AFFIRMED* the Eighth Circuit. The Supreme Court, whose interpretation of Section 523(a)(6) relieves this court of any authority or responsibility for interpreting the scope of Section 523(a)(6), affirmed the Eighth Circuit,

> "ho lding that § 523(a)(6)'s exemption from discharge is confined to debts for an intentional tort". *Kawaauhau* at 523 U.S. at 57.

This language, like that quoted from the Eighth Circuit, is absent from the court's order and Appellees' counsel's briefs. Now that we have the Eighth Circuit setting the RULE and the United States Supreme Court adopting that RULE through express affirmance, what could be left to Appellees' counsel and this court? Perhaps the Ninth Circuit has adopted a different RULE? Alas, this opposite has happened.

The Ninth Circuit, in *Ditto v. McCurdy*, 510 F.3d 1070, (9th Cir. 2007), adhered to the United States Supreme Court decision in *Kawaauhau*, supra, stating that "the Supreme Court clarified that the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'" *Ditto* 510 F.3d at 1076. This clarification is clear. The debt "is confined". An explanation of what this phrase means may be appropriate. The word "confined" is variously defined as "enclosed" or "cramped", "restraint or restrained", and "shut in". One might even go so far as to express the notion that the word "confined" means "limited to". In fact, when used as a verb, "confined" is defined as "limited" in Black's Law Dictionary. Assuming that Appellees' counsel cannot dispute the plain meaning of the English language, the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Eighth Circuit Court of Appeals have decided that the correct RULE in this case, as in all Section 523(a)(6) cases for exemp-

tion from discharge, is that the exemption is "limited", is "rest rained", is "enclosed" in or to AN INTENTIONAL TORT. This court is without power, jurisdiction, or authority to make up its own rule or to ignore this rule.

As previously requested by Appellant, if this court retains its previous order, will the court please at least explain why the above precedents 1) do not apply, 2) identify the tort upon which the debt is based and 3) identify where in the record the debtor had an opportunity to defend and actually litigate the mystery tort.[8] Other than the order awarding attorney fees, what part of the state court record purportedly supports any part of the bankruptcy judge order or this court's order?

THIS COURT AND THE BANKRUPTCY COURT HAVE MISAPPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL

The parties disagree on whether the bankruptcy court and this court have correctly applied the doctrine of collateral estoppel. While both courts have mouthed the standard announced in *Lucido v. Superior Court*, (1990) 51 Cal.3d 335, 341, 272 Cal.Rptr. 76,. neither court has, within the context of the rule, applied *Lucido* to the facts of this case. A clear example of this

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8 "It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *United States v. Lasky*, 600 F.2d 765, 769 (9thCir. 1979).

failure is the treatment given to the Second Cause of Action in the adversary proceeding and determinations that issue preclusion bars litigation of whether the debt is excluded from discharge and the amount of such debt that may be excluded. Appellant has always believed that the simple answer is that even given the broad stroke with which the two courts have used collateral estoppel, the underlying findings relied upon only apply to Appellee Clayeo Arnold, the individual (Arnold), and not to the Appellee Clayeo Arnold, professional law corporation ((PLC/Corporation).

Appellant has argued that "the only fees that could be considered nondischargeable would be those which are shown to flow from the alleged 'malicious desire to harm Arnold' . . ." [9] This language first appears in the original State Court Order awarding fees and costs to Appellee Clayeo Arnold, Appellee Corporation (PLC) and Susan Artenstein (a defendant in the state court action but not a party here). This court dealt with the issue by simply stating "to the extent Appellant argues that the bankruptcy court erred in determining the amount of debt excepted from discharge under Section 523(a)(6) by improperly giving preclusive effect to the state court's factual findings, the Court Disagrees." **Order at page 14: lines 24-28.** This disagreement, with no analysis, is demonstrative of the misapplication of the doctrine of collateral estoppel.

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9 This includes the determination that a debt is excluded from discharge and the amount of such debt that is deemed excluded.

COLLATERAL ESTOPPEL CANNOT BE EMPLOYED TO EXCLUDE THE DEBT OR THE AMOUNT OF THE DEBT TO THE PLC/CORPORATION FROM DISCHARGE UNDER SECTION 523(a)(6).

A clear example of how the courts have misapplied the doctrine of collateral estoppel is found in the orders as they pertain to the Second Cause of Action of the adversary complaint. Simply stated, several debts arose from the state court judgment. Attorney fee awards to Clayeo Arnold, individually and the PLC/Corporation, and costs awarded to Arnold, the PLC/Corporation and Susan Artenstein. The state court judge made what the bankruptcy judge and this court have called "findings". These "findings" have then been used as fodder for the application of issue preclusion in determining whether the debts are excluded from discharge and then the amount of the debts which are excluded from discharge. The problem with the courts' analyses is that they ignore the allegations of the adversary proceeding, the evidence provided by Appellees to support any application of collateral estoppel, and the relationship between the two.

Collateral estoppel requires, at a minimum, that there be an issue which is litigated in one action which is then presented in a second action. The legal analysis requires that the issue be "identical" and that it be actually litigated. With regard to the second cause of action, the following analysis would have to be presented but is absent.

First, the Second Cause of Action in the adversary complaint alleges that " pursuit of the claims by

the debtor were done with **a malicious desire to harm PLC .**" [Emphasis added.] **Appendix at 94, Paragraph 15**. As Appellee PLC, the bankruptcy judge, and this court have all asserted and ultimately found, the application of issue preclusion flows from "giving preclusive effect to the state court' s factual findings." **Order at page14: lines 26-28.** Stated another way, this court bought into the idea that there are "state court findings" which were identical and actually litigated which are presented for litigation in the adversary proceeding.

Second, the "factual findings" which are alleged by Appellee PLC is that "pursuit of the claims by the debtor were done with a malicious desire to harm PLC." **Adversary Complaint. Appendix at 94, Paragraph 15.** This court, citing with approval the order of the bankruptcy judge, which in turn cited with approval the state court order regarding attorney fees, stated the "factual findings" as the sexual harassment claim which was brought "in bad faith and with the [debtor's] declared objective 'to bring Clay [Arnold] down,'" and that she knew from the outset "there was no reasonable basis" for this claim. The bankruptcy court further relied upon the state court's finding that Appellant's "claim was so patently groundless from the outset that it has been obvious throughout the litigation that her motivation was a malicious desire to harm Arnold." **Order at page 8: line 27 - 9: line 7.** These observations are the only evidence offered by Appellee PLC.

Third, the state court, in making its decision on the attorney fees awards, specifically differentiated between the various parties. "Arnold" meant Clayeo

Arnold. "Corporation" meant "Clay eo C. Arnold, a Professional Law Corporation" (PLC) . "Artenstein" meant Susan Artenstein. **State Court Order. Appendix at 96: line 20 through 97: line 9.** The state court noted that the three parties were separately seeking an award of costs and attorney fees. The order specifically sets forth an award to the PLC/Corporation, Arnold, and Artenstein, all separately. In short, three separate and distinct parties were awarded different amounts.

Fourth, the state court findings set forth above related only to Clayeo Arnold, the individual. There is no "fi nding" that Appellant herein had "a malicious desire to harm PLC" as alleged in the adversary complaint. The "factual findings" relied upon by this court, the bankruptcy judge, and the PLC **relate only to Arnold**, the individual. No other " evidence" was offered by Appellee PLC to support any "finding" that Appellant had a "mali cious desire to harm" the PLC (or Susan Artenstein) or that Appellant wanted to bring down the PLC or Artenstein. **It all related to Appellee Arnold**.

In conclusion, how could this court and the bankruptcy judge use issue preclusion to bar litigation of the issues subsumed in Section 523(a)(6) as these issues apply to the PLC (Corporation)? Absolutely no evidence was produced by Appellee PLC other than the allegations of the Adversary Complaint and the state court order. The "factual findings", to the extent that they are in fact "factual findings", have nothing to do with the PLC/Corporation or Artenstein (a non-party here).

This misapplication of collateral estoppel/issue preclusion spills over into all "issues" which were barred from litigation, including whether the debt to the PLC/Corporation was excluded from discharge. The bankruptcy judge denied $185.00 and $237.50 from the Appellees' request. The $185.00 was a cost to Artenstein, who was not before the court, and the $237.50 was the compensatory damage award to the PLC/Corporation. In other words, these amounts are dischargeable. This is the only analysis provided. Other than this, the bankruptcy judge adopted the amount of the award to PLC/Corporation as well as to Clayeo Arnold, individually, as the amount excluded from discharge. At a minimum, this court should rehear the matter on whether the Appellee PLC is entitled to any relief under the adversary complaint given that all evidence presented and all state court "factual findings" relied upon relate only to Appellee Clayeo Arnold, individually, not the PLC/Corporation and reexamine the application of collateral estoppel.

DATED: September 24, 2008

/s/ Melanie Hughes
Melanie Hughes
Debtor/Appellant in Pro Per

(This document is designated as
Docket Number 24 of the
General Docket
United States Court of Appeals
for the Ninth Circuit)

No. 08-17338
Decided October 8, 2009
(Silverman, Rawlinson, and Clifton, Circuit Judges)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELANIE HUGHES

Defendant-Appellant

v.

CLAYEO C. ARNOLD; CLAYEO C. ARNOLD
a Professional Law Corporation

Plaintiffs-Appellees

On Appeal from the United States District Court
For the Eastern District of California

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PETITION FOR PANEL REHEARING AND REHEARING EN BANC [1]

I.

INTRODUCTION AND STATEMENT OF APPELLANT

Melanie Hughes (Hughes) appellant *in Pro Se* in Melanie Hughes v. Clayeo C. Arnold; Clayeo C. Arnold, A Professional Law Corporation, (Arnold) and (PLC), No. 08-17338, petitions for panel rehearing and rehearing en banc of the October 8, 2009 Panel decision (Silverman, Rawlinson, and Clifton, Circuit Judges) because in Hughes' opinion 1) the opinion overlooks established law and directly conflicts with existing opinions by this Circuit as well as other Courts of Appeal and the Supreme Court 2) the opinion substantially affects a rule of national application in which there is an overriding need for national uniformity, 3) the panel's disposition creates an intracircuit conflict, and consideration by the full court is necessary to secure or maintain uniformity of the court's decisions, 4) the proceeding involves a question of exceptional importance, and 5) Hughes has been denied due

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[1] The table of contents have been omitted herein.

process by the Panel's failure to conduct a *de novo* review of the record below.

The Panel held that dischargeability under 11 U.S.C. § 523(a)(6) is not initially conditioned on an intentional tort, but rather a "general intention to cause injury". This standard would include both negligent and reckless acts in direct conflict with binding precedent.

"[T]he word 'intentional,' by itself, will almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent or even reckless . . . so that what is required for nondischargeability is a deliberate or intentional injury, not merely a deliberate or intentional act." *Geiger v. Kawaauhau,* 113 F.3d 848, 852 (8th Cir. 1997).

The Supreme Court affirmed this holding. *Kawaauhau v. Geiger*, (1998) 523 U.S. 57, 118 S. Ct. 974. The new standard announced by the Panel conflicts with the holding of *Geiger.*

If the Panel instead determines that the § 523(a)(6) exception "is confined to debts 'based on what the law has for generations called an intentional tort'" [*Kawaauhau v. Geiger,* 523 U.S. 57 at 60, quoting from *Geiger v. Kawaauhau,* 113 F.3d 848, 852 (8th Cir. 1997) (en banc)], then Hughes also seeks rehearing en banc of the Panel' s decision to deny Hughes' motion to augment the excerpts of record and of the Panel's decision to grant Arnold and PLC's motion to strike portions of the excerpts of record.

Finally, the Panel declined to rule on the issue

of whether the separate debt to PLC is dischargeable, apparently in the mistaken belief that the state trial court made a finding that Hughes harbored a malicious desire to harm PLC. If the Panel declines to modify its decision, Hughes also seeks rehearing en banc on this issue.

II.

SUMMARY OF PROCEEDINGS BELOW

Hughes seeks to discharge an attorney fee and cost award granted to Arnold and PLC as prevailing defendants in a state action concerning a Fair Employment and Housing Administration (FEHA) civil rights claim. [2] The jury found in favor of Hughes and awarded $15,000.00, (**Excerpt at 84**), however, the court entered judgment against Hughes notwithstanding the verdict. **(Excerpt at 325**).

Arnold and PLC then sought an award of attorneys fees as the prevailing Defendants under California Government Code §12965, alleging that Hughes' FEHA action was "frivolous," one of several criteria authorized by that statute. See **Excerpt at 449, Section B.** See also *Mangano v. Verity, Inc.*, 167 Cal.App.4th, 944, 948, 84 Cal.Rptr.3d. 526 (prevailing defendants may recover attorney's fees under Cal.Gov.Code § 12965 "only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or

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[2] Although Hughes appears *in Pro Se* and the Courts refer to her as "an attorney," she was not an attorney and was represented by counsel at the time of the FEHA suit..

vexatious.") [3]

In their summation, Arnold and PLC asserted "the Court must conclude that [Hughes'] action was frivolous, and award Defendants' their reasonable attorneys' fees." **Excerpt at 449:15-16.** Arnold and PLC did not assert at any time, neither in their state court complaint, nor any moving nor reply papers at the state court level that Hughes had ever acted with a " malicious desire to harm" anyone. Because this issue was not presented by Arnold or PLC, Hughes had no occasion to refute at the state court level that which was absent.

PLC was awarded $19,626.05 in costs and $89,302.75 in attorneys fees. Arnold, individually, was awarded $265.00 in costs and $66,213.50 in attorneys fees. See Order. **Excerpt at 458.**

After finding that Hughes' lawsuit was "frivolous, unreasonable and without foundation" ("frivolous" and "unreasonable" as required by statute) the trial court added its unsolicited personal opinion on matters that had not been litigated, to wit, that Hughes' had "a malicious desire to harm Arnold." **Excerpt at. 456:10**. This *dicta*, later described by the Bankruptcy Court as the state judge "throwing in his two cents. . ." as "gratuitous" and as made "in passing" have caused nothing but further litigation and mischief since written. See Transcript,

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[3] This is the general standard applied to several civil rights statutes. See also 42 U.S.C. §12101, et. seq; (ADA) and 42 U.S.C. §3601, et. seq. (FHA), which also provide for fee shifting to prevailing defendants based upon standards identical to California's Government Code § 12965

June 20, 2007, **Excerpt at 202:2 - 204:22.** Since the unsolicited comments would later be repeated often by *both* Arnold and PLC, and quoted in the adversary complaint [and even misquoted when claiming that the *dicta* referred also to PLC], it is important to note that the trial court's *dicta* concerned Hughes' alleged malice to Arnold (an individual) alone - and not to PLC. **Excerpt at 456:10.** [4]

Before the California Court of Appeals, 3rd District, Arnold and PLC admitted that the attorneys fees awarded to them were as a result of Hughes' frivolousness and were not a punishment or penalty of any kind:

> "The trial court did not assess a penalty against [Hughes]. It compensated [Arnold and PLC] for the substantial expense she caused them by bringing this lawsuit in bad faith." **Excerpt at 1057.**

The Court of Appeal also noted that the trial court had erred in admitting prejudicial evidence but did not overturn the result and denied Arnold's request for attorneys fees on appeal as follows:

> "In an abbreviated afterthought, the defendants request an award of their legal fees expended on this appeal, because it represented a continuation of FEHA litigation after it became objec-

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[4] The Panel did not address Hughes' request for a determination of whether the separate attorney fee award to PLC was dischargeable.

> tively frivolous to do so. (Citations omitted) While the remainder of the plaintiff's arguments on appeal can be considered frivolous, she did present a novel and significant issue regarding the interpretation of section 1106 that required a published opinion to resolve . . .. We . . . deny the request for . . . fees in its entirety." (Emphasis added). **Excerpt at 303, Section IX.**

Arnold and PLC then filed a state court complaint against Hughes and her counsel for malicious prosecution. **Excerpt at 263.** Hughes sought bankruptcy relief. Arnold and PLC then brought their Adversary Complaint, however, no tortious conduct, nor injury, was alleged by Arnold and PLC in that Complaint, nor identified in their motion for partial summary judgment. The only fact alleged which purportedly went to Hughes' subjective intent to intentionally cause specific harm to Arnold was the state court judge's "finding" that Hughes' had a "malicious desire to harm Arnold." (**Excerpts at 91:25 - 26** and **183:9**). The Bankruptcy Court conceded on the record that malice had not been pled in the state court and after examining the state court motion for fees and costs remarked:

> "I looked at the motion. Nowhere in the motion does it assert that the lawsuit was brought maliciously but rather seeks fees under the governmental code section that the parties talked about which has discre-

> tion with the court and that is to allow fees if the lawsuit was without foundation, without merit, or unreasonable." **Excerpt at 202:11 - 17.**

The Bankruptcy Court, recognizing that tortious conduct is a threshhold issue queried Arnold and PLC at oral argument on June 20, 2007, asking whether the "plaintiff's claim is malicious prosecution, correct?" to which counsel responded, "Essentially". **Excerpt at 213: 14-16**. No other possible "injury" was ever identified by counsel, nor the Court.

Once Arnold and PLC confirmed the underlying tort was malicious prosecution, Hughes obtained relief from the bankruptcy court to litigate the pending malicious prosecution action and secured a dismissal *with prejudice*. **Excerpt at 860.** Hughes was awarded prevailing party costs. It is well settled that a*retraxit* is equivalent to a judgment on the merits, which bars a subsequent action for the same cause. *Retraxit* is the common law term for a voluntary dismissal with prejudice. *Gagnon Co., Inc. v. Nevada Desert Inn* , (1955) 45 Cal.2d 448, 455. Thus, a dismissal with prejudice, invoking the principles of *res judicata*, will resolve what claims or issues are barred as a result of the *retraxit*.

On appeal to the District Court, Judge Mendez ruled:

"In this Court's opinion, the state court's factual findings are sufficient to show that Appellant's conduct in initiating and prosecuting her sexual harassment claim constituted tortious conduct, resulting in willful and malicious injury. Footnote 4:

> 'An action for the tort of malicious prosecution lies where a prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice'. Soukop v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 292 (2006). Here, the record indicates that Appellant commenced the underlying action and it was pursued to a legal termination favorable to Appellees. The record also indicates that Appellant commenced the underlying action unreasonably for the improper purpose of causing harm. Accordingly, the Court finds that the record contains sufficient evidence demonstrating that Appellant engaged in tortious conduct." **Excerpt at 3089:20 - 3090:1.**

The state court "record" submitted to the bankruptcy court consisted of the following: 1) Arnold and PLC's Complaint against Hughes, [containing a Trespass to Chattels Cause of Action] **(Excerpt at 42),** 2) Hughes' Complaint against Arnold and PLC **(Excerpt at 55),** [5] 3) The state court Judgment notwithstanding the verdict, **(Excerpt at 325),** 4) the Verdict **(Excerpt at 356),** 5) Arnold and PLC's Motion for Attorney's Fees and Costs **(Excerpt at 362 - 402 and 412 -419)** 6) Hughes' Opposition to the

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[5] The Causes of Action in both Complaints were consolidated at trial.

Motion **(Excerpt at 437 - 445)** 7) Arnold and PLC's Reply Memorandum **(Excerpt at 446 - 454)**, 8) the State Court Order disposing of the fee and costs motions **(Excerpt at 454)** 9) the Judgment on Order disposing of the fee and costs motions **(Excerpt at 458)**.

As the only documents submitted, it is unknown what "record" the lower Courts relied upon. In Bankruptcy Court, Arnold and PLC admitted that the underlying state court action was tried over eight-weeks, and that motions, depositions, and records of hearings existed, **(Excerpt at 219:13 - 20)** yet they provided none of these records, and the Courts have continued their analysis absent this record. "The party asserting preclusion bears the burden of showing with clarity and certainty what was determined in the final judgment." *Clark v. Bear Sterns & Co., Inc.* 966 F.2d 1318 (9th Cir. 1992) at 1321, citing *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

Simply stated, the District Court recognized the necessity of an intentional tort, adopted malicious prosecution (an intentional tort) and continued with its analysis. Thus, when themalicious prosecution action was resolved in her favor, Hughes so informed the District Court in her Motion for Rehearing. **Excerpt at 3062.** The Dismissal was offered as Exhibit A. **Excerpt at 3078.** It is requested that the Panel's Order to Strike this dismissal from the record be reviewed.

The Ninth Circuit Panel (Silverman, Rawlinson, and Clifton, Circuit Judges), determined that 11 U.S.C. § 523(a)(6) is not conditioned on an intentional tort, but rather a "general intention to cause injury"

and affirmed the Bankruptcy Court's summary judgment. Although the Panel was charged with a *de novo* review to view the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied the relevant substantive law, [*Graulty v. Brooks (In re Bishop, Baldwin, Reward, Dillingham & Wong, Inc.,)* 819 F.2d 214, 215 (9th Cir. 1987)] it provided only a Memorandum of four paragraphs, without a single citation to record relied upon, nor any analysis of why the binding precedents of *Kawaauhau* and *Geiger* are "unavailing."

III.

PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

A. If the Panel's Opinion Stands, Then Any Cost and Attorney Fee Judgment Awarded to a Prevailing Defendant in Any Action Brought under California's FEHA Act or Any Civil Rights Acts Involving the Same Fee Shifting Standards Will Be Nondischargeable under 11 U.S.C. § 523(a)(6).

The Panel's ruling has equated the standards for a state court to issue a fee award to a prevailing defendant pursuant to Govt. Code § 12965(b) (for unreasonable, frivolous, meritless, or vexatious act by

the plaintiff in bringing the action) [6] with the heightened standards required by 11 U.S.C. § 523(a)(6) (that the plaintiff's conduct was an intentional tort, that she intended the consequences of her act, that she acted willfully and maliciously, and that an injury occurred.)

If this ruling stands, the Bankruptcy Court must now grant summary judgment of nondischargeability in favor of any prevailing defendant of a FEHA action. Gone is an issue of fact as to whether the employee's action in bringing the civil rights lawsuit constituted tortious conduct. Mere frivolity suffices. The issue of fact as to whether the employee intended the consequences of her act is no longer necessary. Vanished is the issue of whether the employee acted both willfully and maliciously. This chilling effect on future civil rights litigation and the ability of honest debtors to be relieved from the weight of oppressive indebtedness could not possibly have been the intent of Congress in adopting 11 U.S.C. § 523(a)(6).

The attorney fee award was not accompanied by any finding of contempt, is not a sanction, nor a judgment for malicious prosecution. The only *bona fide* "fi nding" by the state court is a recitation of the statutory standard required by that Government Code. The *dicta* "malicious desire to harm Arnold" is not the proper standard for awarding attorneys fees against a

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[6] In this case, the only standard presented by Arnold and PLC was that the action was frivolous, thus, the Panel's decision is reduced to a holding that a "frivolous" FEHA claim which results in an attorney fee award to a prevailing defendant created a nondischargeable debt under § 523(a)(6).

losing plaintiff under Govt. Code § 12965. See *Jersey v. John Muir Medical Center* 97 Cal.App.4th 814, 831, 118 Cal.Rptr.2d. 807. See also 42 U.S.C. §12101, et. seq; (ADA) and 42 U.S.C. §3601, et. seq. (FHA); Federal statutes that also provide fee shifting to prevailing defendants based upon identical standards. If the decision of the Panel stands, unsuccessful plaintiffs in state and federal civil rights actions saddled with disastrous fee awards will be denied a fresh start in bankruptcy court.

B. The Panel Mistakenly Gave Preclusive Effect to the State Court Attorney Fee Award.

The Panel provides no analysis of 1) how Hughes' conduct could have been tortious under state law, 2) whether Arnold and PLC were injured, 3) whether Hughes acted willfully, and 4) whether Hughes acted maliciously.

Instead, the Panel echoed a sweeping statement made by Courts below that the issue of Hughes' "willfulness and maliciousness" was "squarely before the court" in determining the fee and costs award under California Gov Code § 12965.

The Bankruptcy Court stated, "The issue of a responding party's good faith or lack thereof is 'squarely in play' when a court addresses a motion for an award of fees under Government Code section 12965(b)." **Excerpt at 249:23 - 26.** However, the Court provided no citation to the record which shows that "willfulness" or "malice" were even mentioned, let alone litigated.

Then, the District Court stated that "Appellant's conduct in pursuing her sexual harassment claim was 'squarely before the state court' on Appellee's motion for attorneys fees under § 12965(b) . . . " **Excerpt at 3092:24 - 26)** and also provided no citation to the record which shows that "willfu lness" or "malice" were even mentioned, let alone litigated.

As these opinions contain no citation to the record actually litigated, the reference "squarely in play" must refer to the state trial court proceedings surrounding the attorney fee and costs sought by Arnold and PLC. However, issues raised in the record before this Court only go to whether Hughes acted "fri volously" in her FEHA action. "Frivolous" as a matter of law, does not equate to "willful" nor "malicious."

C. The Panel's Decision Stands in Direct Contradiction to Established Case Law of the Ninth Circuit and the Supreme Court Which Hold That Prior to a Determination of Nondischargeability, an Intentional Tort is Required.

1. An Examination of the Intentional Tort Requirement:

An examination of intracircuit law reveals the following:

> " . . .we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision [Section 523(a)(6)], **it is necessary that it be**

based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be 'willful'." *Geiger v. Kawaauhau* (8th Cir. 1997) 113 F.3d 848, 853. **Emphasis added.**

The United States Supreme Court, in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998) ***EXPRESSLY AFFIRMED*** the Eighth Circuit's holding that "§523(a)(6)'s exemption from discharge . . is confined to debts 'based on what the law has for generations called an intentional tort.'" *Kawaauhau* at p. 60. [7]

This Circuit, following the Supreme Court's holding in *Kawaauhau* that "the § 523(a)(6) 'willful and malicious injury' exception to discharge is limited to intentional torts and does not encompass mere negligent or reckless acts" in *In re Peklar* held that "A judgment for conversion [an intentional tort] under California substantive law decides only that the defendant has engaged in the 'wrongful exercise of the dominion' over the personal property of the plaintiff. It does not necessarily decide that the de-

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[7] For some inexplicable reason, none of the Courts below address this holding.

fendant has caused 'willful and malicious injury' within the meaning of § 523(a)(6)." *Peklar v. Ikerd* (9th Cir. 2001) 260 F.3d 1035, 1038-1039. [brackets added].

"In 1998, the Supreme Court clarified that the §523(a)(6) exception 'is confined to debts based on what the law has for generations called an intentional tort.'" *Ditto v. McCurdy* (9th Cir. 2007) 510 F.3d 1070, 1076.

"Alt hough the holding there [*Kawaauhau v. Geiger* 523 U.S. 57] was limited to a determination that only **intentional torts,** rather than negligent or reckless acts, can constitute willful and malicious injury, the Court affirmed the Eighth Circuit's holding that '523(a)(6)'s exemption from discharge . . . is confined to debts based on what the law has for generations called an intentional tort.' " *Lockerby v. Sierra* (9th. Cir. 2008) 535 F.3d 1038, 1041.

"The meaning of 'willful' under § 523(a)(6) is controlled by the Supreme Court's decision in *Kawaauhau v. Geiger* . . . Like the en banc Eighth Circuit decision it affirmed, the Court relied on the Restatement (Second) of Torts, observing that 'the [§ 523](a)(6) formulation trig-

> gers in the lawyer's mind the category 'intentional torts . . . " *In re Patch* (8th Cir. 2008) 526 F.3d 1176, 1180.
>
> "Thus, in accordance with the Supreme Court, the interpretation of § 523(a)(6) is confined to an intentional tort standard." *In re Powers* (1998) 227 B.R. 73, 76 (Virginia)
>
> " . . . The Eighth Circuit Court of Appeals in *Geiger* provides similar guidance which is quite compelling, especially in light of the Supreme Court's affirmance of said decision in *Kawaauhau:* [T]he word 'intentional,' by itself, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts . . . The Court finds such reasoning persuasive." *In re Kidd* (1998) 219 B.R. 278, 285.

The Panel's opinion that dischargeability under 11 U.S.C. § 523(a)(6) is not initially conditioned on an intentional tort, but rather a "gene ral intention to cause injury" has placed its decision squarely within the reasons for granting panel rehearing and for rehearing en banc.

2. The Panel's Decision Erroneously Treated the Terms "Injury" and "Da mages" Synonymously.

The attorney fee award is just that, costs of suit. To transform an attorney fee award into an injury is not supported by any case law. The injury for purpose of § 523(a)(6) would be the result of the commission of an intentional tort, i.e., malicious prosecution. The damages or remedy would/could be the attorney fees awarded. The Bankruptcy Court recognized that an attorneys fee award "woul d be a component of the damage claim" for a malicious prosecution action (**Excerpt at 208:4 - 8**). However as a matter of law, Hughes was/is the prevailing party in the suit for malicious prosecution that Arnold PLC brought against her. There being no injury occasioned by a malicious prosecution, no findings of willfulness, nor maliciousness can be substantiated.

> "First, the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits .... [citations omitted]" *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, 272 Cal.Rptr. 767.

At a minimum, the issue of whether Hughes acted with malice is an issue of fact. A *de novo* review of the record before the bankruptcy court would reveal that in the state court action, the jury rendered a verdict that Hughes did not act with "oppression" nor "mali ce" in the concurrently litigated Trespass to

Chattels cause of action. **(Excerpt at 89, verdicts 23 and 24.)**

An appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *F.D.I.C. v. O'Melveny & Myers*, 969 F.2d 744, 747 (9th Cir.1992), *cert. granted*, 510 U.S. 989, 114 S.Ct. 543, 126 L.Ed.2d 445 (1993).

3. Frivolous Behavior Does Not Rise to the Willful and Malicious Conduct Required for the Debt to Be Nondischargeable.

The term "frivolous" is defined by Merriam-Webster as "of little weight or importance" "having no sound basis (as in fact or law)" "a frivolous lawsuit" " lacking in seriousness" and "marked by unbecoming levity."

The "malicious" requirement must be addressed separately from the "willfulness" requirement. *In re Barboza*, 545 F.3d 702 (9th Cir.2008)

A "willful" *injury* is a "deliberate or intentional injury", not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) *(emphasis in original)*. "A 'malicious' injury involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.' " *In re Su*, 290 F.3d at 1146-47 (quoting *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001)).

The required terms are entirely irreconcilable

with mere "frivolity" or a "general intention to cause injury".

IV.

CONCLUSION

Expanding the scope of § 523(a)(6) to include an attorney fee award debt which is not based upon any identifiable or identified tortious conduct circumscribes the purposes of § 523(a)(6). This case expands § 523(a)(6) far beyond any case that has been decided since *Kawaauhau*. The court in *Lockerby* recognized that "state-specific tortious conduct is required under § 523(a)(6)." *Supra* at 1043. California does not recognize any tort of "malicious desire to harm." Even if that "finding" had actually been necessary to the state court's attorney fee award [it wasn't] and assuming that the issue was actually litigated [it wasn't - but malicious prosecution was, and decided in Hughes' favor] an evil desire must be accompanied by conduct that would give rise to a tort action under state law. *Id.* at 1044.

"In order to qualify for the § 523(a)(6) 'willful and malicious' exception to discharge therefore, the debtor must have **acted** with either the desire to injure or a belief that injury was substantially certain to occur." *Ditto v. McCurdy* (9th Cir. 2007) 510 F.3d 1070, 1078. **(Emphasis Added)**

A general "intention to cause injury" as announced by the Panel, and/or a "malicious desire" as announced by the state court, is insufficient.

For the foregoing reasons, Hughes respectfully

requests rehearing of the issues identified above, and/or rehearing en banc, if appropriate, and *de novo* review for the reasons set forth in her opening statement.

Dated: October 21, 2009

/s/ Melanie Hughes
Melanie Hughes
Appellant, *in Pro Se*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17338

In the Matter of: MELANIE HUGHES,

Debtor,

MELANIE HUGHES

Appellant,

v.

CLAYEO C. ARNOLD; et al.,

Appellees.

(Issued December 14, 2009)

ORDER

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

(EOR pp. 3011 to 3012)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-CV-00490 JAM

MELANIE HUGHES,

Appellant,

v.

CLAYEO C. ARNOLD and CLAYEO C. ARNOLD, PROFESSIONAL LAW CORPORATION,

Appellees.

ORDER DENYING MOTION
FOR REHEARING

Appellant's Motion for Rehearing having come on regularly for hearing before the undersigned on October 1, 2008, with appearances by Appellant Melanie Hughes, *in propria persona,* and Gregory J. Hughes, on behalf of Appellees Clayeo C. Arnold and Clayeo C. Arnold, Professional Law Corporation, and the Court having stated its decision on the record, now therefore,

IT IS HEREBY ORDERED that the motion is denied.

Dated: October 8, 2008

/s/ John A. Mendez
HON. JOHN A. MENDEZ
U.S. District Court Judge

APPROVED AS TO FORM AND SUBSTANCE

Dated: October 7, 2008

Hughes & Pritchard LLP

By /s/ *Gregory J. Hughes*
Gregory J. Hughes
Attorney for Appellees

Dated: _____

Declined to sign
Melanie Hughes, *In Propria Persona*